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## COMMENTS

### Congressional Guidance on the Scope of Magistrate Judges' Duties

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#### INTRODUCTION

Magistrate judges are “nothing less than indispensable” to the modern judicial system.<sup>1</sup> While they are not Article III judges, they perform duties that Article III judges would otherwise perform, including presiding over civil jury trials,<sup>2</sup> conducting misdemeanor trials,<sup>3</sup> and conducting voir dire and presiding over jury selection in felony trials.<sup>4</sup> These powers may be delegated to magistrate judges under the Federal Magistrate Act of 1979<sup>5</sup> (FMA 1979) and its subsequent amendments. In addition to specifically enumerated powers, the FMA<sup>6</sup> provides that “magistrate judge[s] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.”<sup>7</sup>

This Additional Duties Clause was designed to provide flexibility, allowing courts to experiment with delegating duties not specifically contemplated by Congress.<sup>8</sup> Such experiments have not always been upheld, though, and the clause has been interpreted to have limitations beyond the textual rule that such duties may not be “inconsistent with the Constitution and laws of

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<sup>1</sup> *Peretz v United States*, 501 US 923, 928 (1991), quoting *Government of the Virgin Islands v Williams*, 892 F2d 305, 308 (3d Cir 1989).

<sup>2</sup> See 28 USC § 636(c)(1).

<sup>3</sup> See 28 USC § 636(a)(3); 18 USC § 3401.

<sup>4</sup> See *Peretz*, 501 US at 935–36, 940 (approving the delegation of these duties with the parties' consent).

<sup>5</sup> Pub L No 96-82, 93 Stat 643.

<sup>6</sup> Throughout this Comment, “the FMA” refers to the current code, while “FMA 19XX” refers to the act passed in year 19XX.

<sup>7</sup> 28 USC § 636(b)(3).

<sup>8</sup> *Jurisdiction of U.S. Magistrates*, HR Rep No 94-1609, 94th Cong, 2d Sess 12 (1976).

the United States.”<sup>9</sup> For example, it is broadly recognized that magistrate judges may not conduct felony trials under the FMA.<sup>10</sup> These additional limitations have been derived not from the Constitution, but from the FMA itself.<sup>11</sup>

The Supreme Court has held that delegations under the Additional Duties Clause should be “comparable in responsibility and importance to”<sup>12</sup> and “bear some relation to” the enumerated duties.<sup>13</sup> Thus, when determining which powers are delegable to magistrate judges under the Additional Duties Clause, circuit courts compare the duty sought to be delegated with those specifically enumerated in the FMA.<sup>14</sup>

The circuits agree about many of the powers that may be delegated, but have divided over whether magistrate judges are empowered by the FMA to accept felony guilty pleas.<sup>15</sup> Three circuits—the Tenth,<sup>16</sup> Eleventh,<sup>17</sup> and Fourth<sup>18</sup>—have held that magistrate judges may accept felony guilty pleas, while the Seventh Circuit has held that magistrate judges may conduct plea colloquies<sup>19</sup> but may not formally accept guilty pleas.<sup>20</sup>

Accepting a felony guilty plea has significant legal consequences, directly affecting a defendant’s rights following the plea’s acceptance. Until a guilty plea is formally accepted, a defendant may withdraw the plea as a matter of course, “for any

<sup>9</sup> 28 USC § 636(b)(3). For an example of one such interpretation, see *Gomez v United States*, 490 US 858, 864–65 (1989) (“When a statute . . . assigns specific duties [to an office], those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization . . . reasonably should bear some relation to the specified duties.”).

<sup>10</sup> See *Gomez*, 490 US at 871–72.

<sup>11</sup> See, for example, *id.*

<sup>12</sup> *Peretz*, 501 US at 933.

<sup>13</sup> *Gomez*, 490 US at 864.

<sup>14</sup> See, for example, *United States v Woodard*, 387 F3d 1329, 1333 (11th Cir 2004) (per curiam) (“[W]e find that conducting a Rule 11 proceeding is comparable to the FMA’s enumerated duties. Therefore, we . . . hold[] that a magistrate judge has the authority under the ‘additional duties’ clause of FMA to conduct Rule 11 proceedings when the defendant consents.”).

<sup>15</sup> See *United States v Harden*, 758 F3d 886, 891 (7th Cir 2014) (“We note that our reasoning [that magistrate judges may not accept guilty pleas] places us in conflict with several of our sister circuits.”).

<sup>16</sup> See *United States v Ciapponi*, 77 F3d 1247, 1251 (10th Cir 1996).

<sup>17</sup> See *Woodard*, 387 F3d at 1333.

<sup>18</sup> See *United States v Benton*, 523 F3d 424, 433 (4th Cir 2008).

<sup>19</sup> The plea colloquy is the process, required by Federal Rule of Criminal Procedure 11(b), by which the court must “address the defendant personally in open court” to inform the defendant of his rights and the charges against him, as well as to establish that the plea is knowing, voluntary, and factually based. FRCrP 11(b).

<sup>20</sup> See *Harden*, 758 F3d at 891.

reason or no reason.”<sup>21</sup> However, after formal acceptance but before sentencing, the plea may be withdrawn for a “fair and just” reason.<sup>22</sup> Ordinarily such a reason must be more than the defendant’s regret, and instead must be based on some flaw in the pre-plea process, such as inadequate assistance of counsel. Therefore, plea acceptance makes the plea legally binding and largely irrevocable. After guilty plea acceptance, defendants are in the same position they would be in after receiving a guilty verdict after trial.<sup>23</sup>

Magistrate judges conduct a large volume of plea proceedings, both in circuits that permit magistrate judges to formally accept guilty pleas and in those that do not. In 2014 alone, magistrate judges conducted 29,536 plea proceedings.<sup>24</sup> If magistrate judges are empowered to accept guilty pleas under the FMA, the circuits that divide plea colloquies from plea acceptance may be introducing needless redundancy and incurring “complete waste[s] of judicial resources.”<sup>25</sup> If, however, magistrate judges are not empowered to accept guilty pleas, thousands of defendants have been prematurely bound to guilty pleas and improperly denied the right to withdraw those pleas. Even if outcomes would be affected in only 1 percent of guilty plea proceedings conducted by magistrate judges, there could be hundreds of wrongful convictions from 2014 alone.

This Comment analyzes whether the Additional Duties Clause empowers magistrate judges to accept felony guilty pleas under a new framework utilizing congressional guidance regarding the clause’s scope. Part I reviews the history of the federal magistrate system, including historical predecessors to magistrate judges and the origins of the FMA. Part II canvasses existing cases on the power of magistrate judges to accept guilty pleas. Finally, Part III introduces an objective framework for analyzing the scope of the Additional Duties Clause. Applying this framework to felony guilty pleas, Part III then argues that the FMA does not empower magistrate judges to accept guilty pleas in felony cases, based on the evident importance that Congress assigns

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<sup>21</sup> FRCrP 11(d)(1).

<sup>22</sup> FRCrP 11(d)(2)(B). A defendant may also withdraw a guilty plea after it has been accepted if the court rejects the plea agreement. FRCrP 11(d)(2)(A).

<sup>23</sup> See *Harden*, 758 F3d at 889.

<sup>24</sup> *Table S-17: Matters Disposed of by U.S. Magistrate Judges during the 12-Month Periods Ending September 30, 2005 through 2014* \*1, archived at <http://perma.cc/V9NP-KNJ7>.

<sup>25</sup> *Benton*, 523 F3d at 432.

to guilty plea acceptance in the Federal Rules of Criminal Procedure. Part III also explores the practical implications of denying magistrate judges this power, both for individual defendants and for the judicial system.

## I. HISTORY OF FEDERAL MAGISTRATES

Judicial assistants and adjuncts have been a part of the American judicial system essentially since the Founding. The precise roles, duties, and qualifications of these assistants have varied over time as weaknesses in the system have been identified and reforms have been made. As a general matter, though, these assistants have gained increasing responsibility over time, through both the origination of the magistrate system in the Federal Magistrate Act and an expansive reading of the Additional Duties Clause of the FMA. Part I traces this historical development, with Part I.A explaining the predecessors to magistrate judges, Part I.B describing the enactment history of the FMA, and Part I.C addressing the history of the Additional Duties Clause specifically. Finally, the Part concludes with a summary of the Supreme Court's interpretation of the Additional Duties Clause to date.

### A. Historical Judicial Assistants and Adjuncts

To understand the role of magistrate judges within the federal judiciary, it is helpful to consider the historical development of judicial assistants and adjuncts. The Constitution grants Congress considerable power to structure the judicial branch by providing in Article III that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"<sup>26</sup> and by providing Congress the complementary Article I power "[t]o constitute Tribunals inferior to the supreme Court."<sup>27</sup> Congress has used this authority to restructure the inferior courts repeatedly.

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<sup>26</sup> US Const Art III, § 1.

<sup>27</sup> US Const Art I, § 8, cl 9.

The Judiciary Act of 1789<sup>28</sup> was the first congressional act to establish inferior courts.<sup>29</sup> It created both circuit courts and district courts,<sup>30</sup> but unlike the modern US court system, it gave circuit courts original jurisdiction over many matters, with only relatively minor cases placed within the jurisdiction of the district courts.<sup>31</sup> While Congress granted the newly established federal courts the power to conduct trials, Congress allowed the states to handle arrest and bail.<sup>32</sup> Granting these powers exclusively to state officials, however, was quickly found to be infeasible due to state officials' resistance to certain federal policies, such as the excise tax on spirits.<sup>33</sup>

To remedy this perceived flaw, Congress gave circuit courts authority to appoint "discreet persons learned in the law" to accept bail.<sup>34</sup> Although they had an important role in the federal judicial system, these individuals were not Article III judges, as they were not subject to the appointment or term requirements established in the Constitution.<sup>35</sup> Nonetheless, Congress repeatedly expanded the power of these appointees through the 1800s, granting them powers including the ability to take affidavits and bail in civil cases,<sup>36</sup> to take depositions in civil cases, to issue arrest warrants, and to hold persons for trial.<sup>37</sup> Despite their ever-expanding responsibilities, however, the requirement that appointees be "learned in the law" was removed in 1812.<sup>38</sup> In 1817, an expansion in power was accompanied by a new title: "commissioners."<sup>39</sup>

This increasing power was not universally welcomed. The commissioners' compensation arrangements and ability to hold

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<sup>28</sup> 1 Stat 73.

<sup>29</sup> See Judiciary Act § 3, 1 Stat at 73–74.

<sup>30</sup> Judiciary Act §§ 2–4, 1 Stat at 73–75.

<sup>31</sup> See Judiciary Act §§ 9, 11, 1 Stat at 76–79; Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1 Fed Cts L Rev 607, 608 (2006) ("District court jurisdiction was initially limited to admiralty cases, seizures and forfeitures, and federal crimes carrying a penalty up to six months or thirty lashes.").

<sup>32</sup> Foschio, 1 Fed Cts L Rev at 608 (cited in note 31).

<sup>33</sup> Id.

<sup>34</sup> Act of Mar 2, 1793 § 4, 1 Stat 333, 334.

<sup>35</sup> See notes 69–71 and accompanying text. See also US Const Art III, § 1.

<sup>36</sup> Act of Mar 1, 1817, 3 Stat 350.

<sup>37</sup> Act of Aug 23, 1842 § 1, 5 Stat 516, 516–17.

<sup>38</sup> See Act of Feb 20, 1812, 2 Stat 679, 680–81.

<sup>39</sup> Act of Mar 1, 1817, 3 Stat at 350.

other offices led to criticisms of their perceived profit-seeking motives.<sup>40</sup> To address these criticisms, the system was reformed in 1896 to establish a uniform four-year term, a uniform fee schedule, and a prohibition against holding certain other offices.<sup>41</sup> While the reforms were largely successful, concerns remained that commissioner fees were too low to attract qualified commissioners and, relatedly, that too few commissioners had legal training.<sup>42</sup>

The next major development in the commissioner system came in 1942, when the director of the Administrative Office of the US Courts prepared a study on the office of commissioner.<sup>43</sup> The study was requested by the Judicial Conference of the United States, the policy-making body for the federal courts,<sup>44</sup> in response to pending legislation that would have further expanded the commissioners' jurisdiction.<sup>45</sup> The report described the role of the commissioner as that of "a Federal justice of the peace" and "an adjunct of the district courts with independent but subordinate judicial powers."<sup>46</sup> The study ultimately concluded that the commissioner system "st[ood] in great need of improvement" and that "[s]omething should be done."<sup>47</sup> Despite this perceived need and the extensive study undertaken, the report concluded that "[j]ust what line change should take may not [ ] be so clear."<sup>48</sup> With that ambiguous call for change, another twenty-six years passed before additional major reform came to the system.

## B. Original Enactment and Subsequent Amendments of the Federal Magistrate Act

After decades of discussion and debate, in 1968 the Federal Magistrates Act<sup>49</sup> (FMA 1968) abolished the old commissioner

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<sup>40</sup> See Foschio, 1 Fed Cts L Rev at 610–11 (cited in note 31). This motivation was particularly stark in the compensation for fugitive slave cases, in which commissioners were paid more for ordering alleged slaves to be returned to their alleged owners than for permitting alleged slaves to remain free. Id at 609.

<sup>41</sup> Act of May 28, 1896 §§ 19–21, 29 Stat 140, 184–85.

<sup>42</sup> See Foschio, 1 Fed Cts L Rev at 611–13 (cited in note 31).

<sup>43</sup> See generally *United States Commissioners: A Report to the Judicial Conference* (Administrative Office of the US Courts 1942).

<sup>44</sup> *About the Judicial Conference* (Administrative Office of the US Courts), archived at <http://perma.cc/79WE-YX5R>.

<sup>45</sup> *United States Commissioners* at 1–2 (cited in note 43). For the proposed legislation that would have expanded commissioners' jurisdiction, see HR 6902, 77th Cong, 2d Sess, in 88 Cong Rec 3375 (Apr 6, 1942).

<sup>46</sup> *United States Commissioners* at 3 (cited in note 43).

<sup>47</sup> Id at 52.

<sup>48</sup> Id.

<sup>49</sup> Pub L No 90-578, 82 Stat 1107 (1968).

system entirely, replacing commissioners with “magistrates.”<sup>50</sup> Responsibility for administering the magistrate system, including determining the number of magistrates as well as the type, location, and salary of each magistrate position, was given to the Judicial Conference.<sup>51</sup> FMA 1968 gave magistrates broader power than had ever been available to commissioners, providing them with not only “all powers and duties conferred or imposed upon United States commissioners,”<sup>52</sup> but also “the power to administer oaths and affirmations, impose conditions of release . . . , and take acknowledgments, affidavits, and depositions”<sup>53</sup> and the power to conduct certain minor criminal trials.<sup>54</sup> Further, FMA 1968 provided that, with “the concurrence of a majority of all the judges” of a district, magistrates in that district could be granted “such additional duties as are not inconsistent with the Constitution and laws of the United States.”<sup>55</sup>

The vagueness of “additional duties” quickly led to conflicting court decisions on the exact boundaries of this power. For example, a circuit split developed regarding whether magistrates were empowered under FMA 1968 to conduct evidentiary hearings in federal habeas corpus cases.<sup>56</sup> In *Wingo v Wedding*,<sup>57</sup> the Supreme Court resolved this split by narrowly construing the power of magistrates, concluding that FMA 1968 had not “changed the requirement . . . that federal judges personally conduct habeas corpus evidentiary hearings.”<sup>58</sup> Congress responded by passing the 1976 amendments to the Federal Magistrates Act<sup>59</sup> (FMA 1976), which were intended to “clarify the powers of magistrates.”<sup>60</sup> The amendments expanded magistrates’ power beyond the limits in *Wingo* by explicitly permitting magistrates “to hear habeas corpus and prisoner civil rights actions, to review administrative determinations of Social Security benefits, and to issue reports and

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<sup>50</sup> FMA 1968 § 101, 82 Stat at 1108–14, codified as amended at 28 USC §§ 631–39.

<sup>51</sup> FMA 1968 § 101, 82 Stat at 1111, codified as amended at 28 USC § 633(b).

<sup>52</sup> FMA 1968 § 101, 82 Stat at 1113, codified as amended at 28 USC § 636(a)(1).

<sup>53</sup> FMA 1968 § 101, 82 Stat at 1113, codified as amended at 28 USC § 636(a)(2).

<sup>54</sup> See FMA 1968 § 101, 82 Stat at 1113, codified as amended at 28 USC § 636(a)(3).

<sup>55</sup> FMA 1968 § 101, 82 Stat at 1113, codified as amended at 28 USC § 636(b).

<sup>56</sup> Compare *O’Shea v United States*, 491 F2d 774, 778 (1st Cir 1974), with *Wedding v Wingo*, 483 F2d 1131, 1132–33 (6th Cir 1973).

<sup>57</sup> 418 US 461 (1974).

<sup>58</sup> *Id* at 469–73.

<sup>59</sup> Act of Oct 21, 1976, Pub L No 94-577, 90 Stat 2729, codified as amended at 28 USC § 636(b).

<sup>60</sup> Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 Valp U L Rev 661, 665 (2005).



recommendations concerning motions to dismiss and for summary judgment.”<sup>61</sup> This expansion continued when Congress passed the Federal Magistrate Act of 1979, which further “increased the role, responsibilities, and status of the magistrate.”<sup>62</sup> FMA 1979 authorized magistrates, upon the consent of the parties, to try civil cases and to enter final judgment in those cases.<sup>63</sup> It also authorized delegation to magistrates of all federal misdemeanor trials, rather than the more limited criminal authority authorized by FMA 1968.<sup>64</sup> Finally, FMA 1979 made several changes to the magistrate appointment process.<sup>65</sup> The expanded power of magistrates was symbolically reflected in the Judicial Improvements Act of 1990<sup>66</sup> (JIA), which officially changed the title of these officers from “United States magistrate” to “United States magistrate judge.”<sup>67</sup> The policy rationale for the ever-expanding power of magistrate judges is illuminated by the other reforms in JIA, which included the requirement for district courts to adopt a “civil justice expense and delay reduction plan.”<sup>68</sup> Despite these changes, magistrate judges remain distinct from Article III judges in their appointment,<sup>69</sup> tenure,<sup>70</sup> and jurisdiction.<sup>71</sup>

In addition to expanding magistrate judges’ powers, Congress added specificity regarding these powers, the role of the parties’ consent, and the interaction of magistrate judges with district courts.<sup>72</sup> Currently, without any specific designation from a district judge, a magistrate judge may exercise all the powers of the

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> FMA 1979 § 2(2), 93 Stat at 643, codified as amended at 28 USC § 636(c)(1).

<sup>64</sup> See FMA 1979 § 7(a)(1), 93 Stat at 645, codified as amended at 18 USC § 3401(a).

<sup>65</sup> For example, the rules governing the ability of magistrates to serve in adjoining districts were modified. See FMA 1979 § 3(a), 93 Stat at 644, codified as amended at 28 USC § 631(a).

<sup>66</sup> Pub L No 101-650, 104 Stat 5089.

<sup>67</sup> JIA § 321, 104 Stat at 5117, codified as amended at 28 USC § 631 note.

<sup>68</sup> JIA § 103(a), 104 Stat at 5090, codified as amended at 28 USC § 471.

<sup>69</sup> Compare 28 USC § 631(a) (providing for the appointment of magistrate judges by district court judges), with US Const Art II, § 2, cl 2 (providing the president the power to appoint “judges of the Supreme Court, and all other officers of the United States,” with the advice and consent of the Senate).

<sup>70</sup> Compare 28 USC § 631(e) (providing magistrate judges eight-year terms), with US Const Art III, § 1 (requiring that judges be granted life tenure).

<sup>71</sup> Compare 28 USC § 636 (outlining the jurisdiction of magistrate judges), with 28 USC §§ 1331–69 and 18 USC § 3231 (outlining the jurisdiction of district courts).

<sup>72</sup> See, for example, JIA § 308(a), 104 Stat at 5112, codified as amended at 28 USC § 636(c)(2); Federal Courts Improvement Act of 1996 §§ 201–02, Pub L No 104-317, 110 Stat 3847, 3848–49, codified as amended at 18 USC § 3401 and 28 USC § 636; Federal

former US commissioners,<sup>73</sup> administer oaths and take affidavits,<sup>74</sup> conduct misdemeanor trials,<sup>75</sup> enter sentences for petty offenses,<sup>76</sup> and enter sentences for class A misdemeanors with the parties' consent.<sup>77</sup> However, while a magistrate judge may handle almost "any pretrial matter pending before the court," a magistrate judge has jurisdiction over such matters only upon designation from a district judge.<sup>78</sup> Further, actions taken by a magistrate judge pursuant to pretrial matters are reviewable by the district court for clear error.<sup>79</sup> For those pretrial matters specifically withheld from magistrate judges by statute, district judges may designate magistrate judges to hold hearings and submit recommendations.<sup>80</sup> Additionally, magistrate judges may serve as special masters pursuant to Rule 53 of the Federal Rules of Civil Procedure or in any civil case with the parties' consent.<sup>81</sup> With the consent of the parties, magistrate judges may also conduct all proceedings in a jury or nonjury civil matter, including ordering final entry of judgment.<sup>82</sup> Finally, the Additional Duties Clause provides that "[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."<sup>83</sup>

Due to magistrate judges' broad role and the heavy federal caseload, magistrate judges are considered "indispensable" to the judicial system.<sup>84</sup> One indicator of the scale of the magistrate

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Courts Improvement Act of 2000 §§ 202–03, Pub L No 106-518, 114 Stat 2410, 2412–14, codified at 18 USC § 3401 and 28 USC § 636.

<sup>73</sup> 28 USC § 636(a)(1).

<sup>74</sup> 28 USC § 636(a)(2).

<sup>75</sup> See 28 USC § 636(a)(3); 18 USC § 3401.

<sup>76</sup> 28 USC § 636(a)(4).

<sup>77</sup> 28 USC § 636(a)(5).

<sup>78</sup> 28 USC § 636(b)(1)(A). The exceptions are:

motion[s] for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 USC § 636(b)(1)(A).

<sup>79</sup> 28 USC § 636(b)(1)(A).

<sup>80</sup> 28 USC § 636(b)(1)(B).

<sup>81</sup> 28 USC § 636(b)(2). See also FRCP 53.

<sup>82</sup> 28 USC § 636(c)(1).

<sup>83</sup> 28 USC § 636(b)(3).

<sup>84</sup> *Peretz v United States*, 501 US 923, 928–29 & n 5 (1991), quoting *Government of the Virgin Islands v Williams*, 892 F2d 305, 308 (3d Cir 1989).

judges' work is that, in the year before September 2014, magistrate judges disposed of 1,102,396 matters.<sup>85</sup> Notably, over half of these matters—580,462—fell under the Additional Duties Clause of § 636(b)(3).<sup>86</sup> This total includes 29,536 guilty plea proceedings<sup>87</sup>—or, based on data from the year ending in March 2014, likely over a third of the total guilty pleas during this period.<sup>88</sup>

### C. Role and Scope of the Additional Duties Clause

The Additional Duties Clause was designed to provide courts flexibility to “experiment” with delegating matters that do not fit directly into any of the magistrate judges’ enumerated powers.<sup>89</sup> However, the legislative history suggests that there are limitations on the types of experimentation envisioned, as one of the ultimate goals was to promote the “unhurried performance” by district judges of their core duties.<sup>90</sup> This focus on ensuring that Article III judges are able to devote sufficient attention to their core duties implies that those core duties cannot be delegated to magistrate judges.

The only explicit textual limitation on the powers assignable under this clause is that such duties must not be “inconsistent with the Constitution and laws of the United States.”<sup>91</sup> Constitutional limits on assignment are based on concern for both individual rights and structural protections,<sup>92</sup> including the separation of powers and the nondelegation doctrine. The combination of these principles suggests that neither Congress nor the courts themselves are constitutionally empowered to delegate the “judicial power” to anyone other than Article III judges. Despite these theoretical limits, though, no delegations of power to magistrate judges have been struck down as unconstitutional to date.

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<sup>85</sup> Table S-17: *Matters Disposed of by U.S. Magistrate Judges at \*1* (cited in note 24).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Table D-4: *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, during the 12-Month Period Ending March 31, 2014 \*1*, archived at <http://perma.cc/VKP2-8KQY> (noting that 80,111 criminal defendants pleaded guilty in US district courts in the year ending March 31, 2014).

<sup>89</sup> HR Rep No 94-1609 at 12 (cited in note 8) (explaining that the Additional Duties Clause “enables the district courts to continue innovative experimentations in the use of this judicial officer”).

<sup>90</sup> *Id.* (“If district judges are willing to experiment with the assignment to magistrates of other functions . . . , there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties.”).

<sup>91</sup> 28 USC § 636(b)(3).

<sup>92</sup> See *Peretz*, 501 US at 936–40.

However, courts have broadly agreed that the narrow textual limitation should not be understood to mean that everything constitutionally permissible and not directly prohibited by statute is permitted under the FMA.<sup>93</sup> If all constitutionally permissible delegations were authorized by the Additional Duties Clause, then this clause would authorize all of the powers specifically enumerated in other provisions of the FMA. Such a reading would render the specific enumeration of delegable duties in the FMA superfluous. The Supreme Court has repeatedly noted the duty of courts “to give effect, if possible, to every clause and word of a statute,” even “describing this rule as a cardinal principle of statutory construction.”<sup>94</sup>

Similarly, the canon of *expressio unius est exclusio alterius* cautions against an overly expansive reading of the Additional Duties Clause. For example, a frequently cited limitation is that magistrate judges may not preside over felony trials under § 636(b)(3).<sup>95</sup> This limitation is inferred despite the fact that “a literal reading [of] this additional duties clause would permit magistrates to conduct felony trials.”<sup>96</sup> The doctrine of *expressio unius* requires such a limitation, because, as the Supreme Court has recognized, the specific grant of power to preside over misdemeanor trials implies the withholding of power to preside over felony trials.<sup>97</sup>

The *ejusdem generis* canon further suggests that the Additional Duties Clause should not be read to provide the full extent of powers its literal text would suggest. Under this doctrine, “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific

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<sup>93</sup> See, for example, *Gomez v United States*, 490 US 858, 871–72 (1989) (holding that the delegation of jury selection in felony trials to magistrate judges is not permissible under the FMA, without holding that such delegation would be unconstitutional).

<sup>94</sup> *Duncan v Walker*, 533 US 167, 174 (2001) (quotation marks omitted), quoting *United States v Menasche*, 348 US 528, 538–39 (1955), and *Williams v Taylor*, 529 US 362, 404 (2000).

<sup>95</sup> See, for example, *Gomez*, 490 US at 871–72.

<sup>96</sup> *Id.*

<sup>97</sup> See *id.* at 872 (“[T]he carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.”). It is worth mentioning that, while the exclusion of felony trials has primarily been addressed as a matter of congressional intent, there are also serious arguments that such a delegation would be unconstitutional. See *id.* at 863–64 (noting the “abiding concerns regarding the constitutionality of delegating felony trial duties to magistrates” before proceeding to the statutory interpretation question under the doctrine of constitutional avoidance).

words.”<sup>98</sup> Given the structure of § 636, which includes a specific list of identified duties followed by a seemingly broad, general grant, *ejusdem generis* seems applicable.<sup>99</sup> It is clear, then, that ordinary principles of statutory interpretation suggest a reading of the Additional Duties Clause that is more limited than its literal text. The next Section discusses the Supreme Court’s interpretation of these limitations to date.

#### D. Supreme Court Precedent on the Scope of the Additional Duties Clause

Given the vagueness of the Additional Duties Clause, delegations to magistrate judges under this clause have been the subject of significant litigation. In multiple cases, the Supreme Court has determined the assignability of duties under the Additional Duties Clause by comparing the duty sought to be assigned with the duties specifically enumerated in the FMA.<sup>100</sup> The Court has also suggested that the parties’ consent is relevant for at least some duties.<sup>101</sup>

The Supreme Court first considered the Additional Duties Clause in *Mathews v Weber*.<sup>102</sup> The plaintiff challenged an administrative determination that he was not entitled to Medicare reimbursement for certain medical payments.<sup>103</sup> The case was referred to a magistrate, who made initial findings of fact and recommendations to the district judge.<sup>104</sup> Under the referral order, the district judge retained final decision-making authority and the right to review evidence *de novo*.<sup>105</sup> Nonetheless, the defendant moved to vacate the reference to the magistrate, arguing

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<sup>98</sup> *Washington State Department of Social and Health Services v Guardianship Estate of Keffeler*, 537 US 371, 384 (2003) (brackets omitted).

<sup>99</sup> Justice Antonin Scalia recognized the relevance of *ejusdem generis* in his *Peretz* dissent. See *Peretz*, 501 US at 955 (Scalia dissenting) (“The canon of *ejusdem generis* keeps the ‘additional duties’ clause from swallowing up the rest of the statute.”). While no majority opinion interpreting the Additional Duties Clause has invoked this canon, the Supreme Court’s interpretation of this clause has nonetheless incorporated the rule that the additional duties must be somewhat similar to those enumerated. See Part I.D.

<sup>100</sup> See, for example, *Gomez*, 490 US at 864; *Peretz*, 501 US at 933 (“[W]e would still be reluctant, as we were in *Gomez*, to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates.”).

<sup>101</sup> See *Peretz*, 501 US at 932.

<sup>102</sup> 423 US 261 (1976).

<sup>103</sup> *Id.* at 263.

<sup>104</sup> *Id.* at 263–64.

<sup>105</sup> *Id.* at 270–71.

that it was unauthorized under the FMA.<sup>106</sup> The Court disagreed, holding that “[u]nder the part of the order at issue the magistrates perform a limited function” and that the FMA permitted the delegation.<sup>107</sup> The Court emphasized that the magistrate had a “limited role” in performing a “preliminary-review function” that served to “help[ ] focus the court’s attention on the relevant portions of what may be a voluminous record, from a point of view as neutral as that of an Article III judge.”<sup>108</sup> Such a limited role, the Court concluded, “[f]ell] well within the range of duties Congress empowered the district courts to assign to” magistrates, thus implicitly comparing the importance of the duty at issue to those specifically enumerated in the FMA.<sup>109</sup> While the Court declined to “define the full reach of a magistrate’s authority under the Act” in *Mathews*,<sup>110</sup> it effectively established that the importance and independence of a duty should be compared to those specifically enumerated in determining the duty’s assignability.

The Court first struck down a delegation to a magistrate in *Gomez v United States*,<sup>111</sup> in which a magistrate was assigned the duty of performing voir dire for a felony trial.<sup>112</sup> When the district judge assigned jury selection to a magistrate, Jose Gomez and Diego Chavez-Tesina’s counsel made timely objections to the assignment.<sup>113</sup> Nonetheless, the magistrate proceeded to perform voir dire and jury selection.<sup>114</sup> Following jury selection, the district judge offered to review any ruling de novo, but the defense brought no specific challenges, simply objecting to the magistrate’s role.<sup>115</sup> After being found guilty, Gomez and Chavez-Tesina appealed, bringing no specific challenges to the jurors selected but alleging “that the [m]agistrate had no power to conduct the voir dire examination and jury selection.”<sup>116</sup> The Supreme Court overturned the convictions, holding that jury selection in a felony trial

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<sup>106</sup> *Mathews*, 423 US at 265. In the district court, the defendant “also argued that the reference was of doubtful constitutionality,” but he “expressly declined” to argue the constitutional point before the Supreme Court. *Id.*

<sup>107</sup> *Id.* at 270.

<sup>108</sup> *Id.* at 271.

<sup>109</sup> *Id.* at 270.

<sup>110</sup> *Mathews*, 423 US at 270.

<sup>111</sup> 490 US 858 (1989).

<sup>112</sup> *Id.* at 860.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Gomez*, 490 US at 861.

<sup>116</sup> *Id.* (emphasis omitted).

is not assignable to a magistrate under the FMA, at least without the parties' consent.<sup>117</sup>

The Court narrowly construed the FMA's Additional Duties Clause in *Gomez* in part due to the principle of constitutional avoidance, because the Court doubted the constitutionality of magistrates conducting voir dire.<sup>118</sup> Specifically, the Court had "serious doubts that a district judge could review [voir dire] meaningfully," due to the importance of in-person interaction with jurors.<sup>119</sup> Further, the Court reaffirmed the principle from *Mathews* that any duties assigned under the Additional Duties Clause should be compared to those specifically enumerated, noting, "When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."<sup>120</sup> Based on this principle, the Court concluded that it was unlikely that Congress intended to grant a duty as important as voir dire to magistrates in "[t]he absence of a specific reference to jury selection in the statute, or indeed, in the legislative history."<sup>121</sup>

The magistrate's power to conduct jury selection came before the Court again in *Peretz v United States*.<sup>122</sup> When the district judge in *Peretz* sought the parties' consent to assign jury selection to a magistrate, the defendant's counsel responded that he "would love the opportunity" to select the jury before a magistrate.<sup>123</sup> Neither the defendant nor his counsel objected to the role of the magistrate in voir dire until appeal.<sup>124</sup> Ultimately, the Court held that the selection of a jury in a felony trial is assignable with the parties' consent.<sup>125</sup> The Court concluded that "those specified duties that were comparable to jury selection in a felony trial could be performed only with the consent of the litigants" under the FMA.<sup>126</sup> The "specified duties" that the Court considered "comparable to jury selection" included the power "to try minor offenses," to "be designated as a special master in any civil case," and to try

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<sup>117</sup> *Id.* at 875–76.

<sup>118</sup> *Id.* at 863–64.

<sup>119</sup> *Gomez*, 490 US at 874–75 (explaining that an examiner during voir dire "must elicit from prospective jurors candid answers about intimate details of their lives").

<sup>120</sup> *Id.* at 864.

<sup>121</sup> *Id.* at 875.

<sup>122</sup> 501 US 923 (1991).

<sup>123</sup> *Id.* at 925.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 932–33.

<sup>126</sup> *Peretz*, 501 US at 931.

"all misdemeanors."<sup>127</sup> Because the Court believed these duties were of similar importance to jury selection, and because these duties were entrusted to magistrates with the consent of the parties, the Court believed jury selection could also be entrusted to magistrates with the consent of the parties.<sup>128</sup> The *Peretz* opinion emphasized that the Court "would still be reluctant . . . to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates."<sup>129</sup>

In response to constitutional arguments, the *Peretz* Court held that the parties' prior consent had waived any constitutional concerns.<sup>130</sup> The Court reasoned that only individual rights were at issue in the assignment, and defendants are able to waive even fundamental individual rights.<sup>131</sup> Had there been "structural" concerns implicated, such as the separation of powers, the defendant may not have been able to waive them.<sup>132</sup> However, because the district court retained the right to decide whether to assign voir dire to a magistrate and the ability to review determinations de novo, the Court held that no structural concerns were involved.<sup>133</sup>

In applying these precedents, circuit courts have noted that the Court repeatedly emphasized in these cases that, with or without the parties' consent, the relevant inquiry is the "responsibility and importance" of the duty as compared to those enumerated in the FMA.<sup>134</sup> A duty of significantly greater importance or

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<sup>127</sup> *Id.* (quotation marks omitted).

<sup>128</sup> *Id.* at 933.

<sup>129</sup> *Id.*

<sup>130</sup> *Peretz*, 501 US at 936–37.

<sup>131</sup> *Id.*

<sup>132</sup> *Commodity Futures Trading Commission v Schor*, 478 US 833, 850–51 (1986) ("To the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty.").

<sup>133</sup> *Peretz*, 501 US at 937. The majority did not express the same concerns over the reviewability of voir dire as the Court had in *Gomez*, a seeming inconsistency raised by Justice Thurgood Marshall in his *Peretz* dissent. See *id.* at 945 (Marshall dissenting) ("[D]ifficulties in providing effective review of magistrate jury selection were central to our construction of the [Federal Magistrate] Act in *Gomez*, yet they are essentially ignored today.").

The result in *Peretz* was confirmed in *Gonzalez v United States*, 553 US 242 (2008), the Court's most recent case involving the Additional Duties Clause and the assignment of voir dire in a felony trial. The primary issue in *Gonzalez* was whether a defendant had to personally consent to the assignment of voir dire to a magistrate judge or whether a defendant's attorney could provide the requisite consent. *Id.* at 243–44. The Court held that the consent required to make the magistrate judge's exercise of authority permissible in this context can come from the defendant's attorney. *Id.* at 245.

<sup>134</sup> *United States v Harden*, 758 F3d 886, 888 (7th Cir 2014).



complexity than any of those specifically enumerated is properly reserved to Article III judges alone.<sup>135</sup>

## II. CHALLENGES TO THE ABILITY OF MAGISTRATE JUDGES TO ACCEPT FELONY GUILTY PLEAS

The duty to accept felony guilty pleas is frequently assigned to magistrate judges in several circuits, but has been challenged as a nonassignable duty, even with the parties' consent.<sup>136</sup> Courts are in agreement that magistrate judges may conduct plea colloquies, but the ability of magistrate judges to formally accept guilty pleas remains the subject of a split among the circuits. The Supreme Court has not ruled on this issue, but three circuits have ruled that magistrate judges may accept guilty pleas, while one circuit has held that this power is unavailable to magistrate judges under the FMA.<sup>137</sup> This Part first describes the procedure for taking and formally accepting guilty pleas. It then explores the reasoning of courts on each side of the split, before finally considering the positions of circuits that have not yet taken a clear position on the issue.

### A. Plea Procedure and Plea Acceptance

The procedures for taking guilty pleas, for both felonies and misdemeanors, are very formalized.<sup>138</sup> The Federal Rules of Criminal Procedure (FRCrP) state that the court must determine that the plea is being entered knowingly and voluntarily and "that there is a factual basis for the plea" prior to accepting the

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<sup>135</sup> See *id.* at 888–89 (noting that "the acceptance of the guilty plea is quite similar in importance to the conducting of a felony trial," the latter of which only Article III judges are permitted to undertake).

<sup>136</sup> Preliminarily, this issue's appealability may seem questionable given the parties' consent. Generally, issues not raised in a lower court are waived and cannot be grounds for appeal even if they were erroneously decided. However, "when a federal judge . . . performs an act of consequence that Congress has not authorized, reversal . . . may be appropriate even if the defendant has waived the issue or otherwise consented, even if the judge has done a superb job on the merits and even if the defendant cannot show prejudice." *United States v. Harden*, 758 F3d 886, 890–91 (7th Cir. 2014), citing *Rivera v. Illinois*, 556 US 148, 161 (2009), and *Nguyen v. United States*, 539 US 69, 73–81 (2003).

<sup>137</sup> Cases approving magistrate judges' ability to accept guilty pleas include *United States v. Ciapponi*, 77 F3d 1247, 1251–52 (10th Cir. 1996), *United States v. Woodard*, 387 F3d 1329, 1333 (11th Cir. 2004) (per curiam), and *United States v. Benton*, 523 F3d 424, 433 (4th Cir. 2008). The sole circuit to explicitly deny this power to magistrate judges is the Seventh Circuit. See *Harden*, 758 F3d at 889.

<sup>138</sup> See *United States v. Reyna-Tapia*, 328 F3d 1114, 1120 (9th Cir. 2003) (en banc) (describing plea proceedings as "highly structured event[s] that follow[ ] a familiar script and [are] governed by the specific terms of Rule 11").

plea.<sup>139</sup> FRCrP 11(b)(1) requires that, to make these determinations, "the court must address the defendant personally in open court" to "inform the defendant of, and determine that the defendant understands," his rights and how they will be affected by his plea.<sup>140</sup> While this stage, known as the plea colloquy, has been criticized as "a carefully rehearsed charade during which the participants merely enact a script"<sup>141</sup> that "lack[s] real significance as [a] decisionmaking process[ ],"<sup>142</sup> judges do sometimes reject guilty pleas following colloquies due to perceived deficiencies in defendants' responses.<sup>143</sup> All circuits that have addressed the issue have affirmed that magistrate judges may perform plea colloquies and recommend dispositions to district judges.<sup>144</sup>

Performing the plea colloquy is distinct from accepting a guilty plea, however, because the formal acceptance of a guilty plea has legal consequences.<sup>145</sup> Before the court formally accepts a guilty plea, a defendant may freely withdraw the plea for "any reason or no reason."<sup>146</sup> After a guilty plea is accepted but prior to sentencing, the plea can be withdrawn only for a "fair and just reason," as determined by the court, or upon the court's rejection of a plea agreement.<sup>147</sup> Thus, whether a magistrate judge may actually accept a guilty plea, or may only perform the plea colloquy and recommend a disposition to the district judge, affects a defendant's substantive rights following a plea colloquy with the magistrate judge. While the district court retains the right to review the magistrate judge's determinations de novo, this standard of review does not effectively undo the legal implications of plea

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<sup>139</sup> FRCrP 11(b)(1)–(3).

<sup>140</sup> FRCrP 11(b)(1).

<sup>141</sup> Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 Stan L Rev 547, 552 (1997).

<sup>142</sup> Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga L Rev 407, 460 (2008).

<sup>143</sup> See, for example, *United States v Chiapetta*, 2003 WL 22071478, \*3 (ND Ill) ("A plea colloquy was held. However, after the government presented the factual basis for the plea, defendant disagreed with facts essential for her guilt and the guilty plea was not accepted."); *Evans v Britton*, 639 F2d 221, 222 (5th Cir 1981) (per curiam) (describing the trial court's refusal to accept the defendants' guilty pleas); *United States v James*, 210 F3d 1342, 1346 (11th Cir 2000) (per curiam) (explaining that the colloquy was deficient and "that James [neither] knew [n]or understood the elements comprising the charge").

<sup>144</sup> See Parts II.B–D.

<sup>145</sup> See *Boykin v Alabama*, 395 US 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.").

<sup>146</sup> FRCrP 11(d)(1).

<sup>147</sup> FRCrP 11(d)(2).

acceptance. De novo review of plea acceptance will still require the judge to uncover a reason why the plea should not have been accepted, while a defendant would not have to provide any reason for plea withdrawal if the plea had not yet been accepted. Thus, for a defendant wishing to withdraw a plea for a reason the court does not consider "fair and just," such as simple regret, the difference in standard may determine whether the case proceeds to trial or simply proceeds to sentencing. The circuits have split on this narrow but important issue.

#### B. The Majority View: Magistrate Judges Can Accept Guilty Pleas

The Tenth Circuit was the first circuit to address magistrate judges' authority to accept felony guilty pleas. In *United States v Ciapponi*,<sup>148</sup> George Ciapponi pleaded guilty to felony marijuana possession with intent to distribute.<sup>149</sup> Prior to beginning plea proceedings, Ciapponi was informed by a magistrate judge that he had the right to appear before a district judge to enter his plea.<sup>150</sup> Ciapponi then explicitly consented to proceeding before a magistrate judge and did not attempt to withdraw his plea or object to the proceedings before the magistrate judge until appeal.<sup>151</sup> The appeals court held that magistrate judges could accept guilty pleas "so long as a defendant's right to demand an Article III judge is preserved."<sup>152</sup> In reaching this conclusion, the court implicitly decided that accepting felony guilty pleas with defendants' consent bore "some reasonable relation to the specified duties which may be assigned to magistrate judges under the Magistrates Act."<sup>153</sup> However, rather than directly comparing it with any of the duties directly specified in the FMA, the court made an indirect comparison to these duties, as it focused on the importance of presiding over voir dire, the delegation of which the Supreme Court had already held to be permissible with the parties' consent under the FMA in *Peretz*.<sup>154</sup>

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<sup>148</sup> 77 F3d 1247 (10th Cir 1996).

<sup>149</sup> *Id.* at 1249.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Ciapponi*, 77 F3d at 1251-52.

<sup>153</sup> *Id.* at 1250.

<sup>154</sup> *Id.* at 1251. Interestingly, the court also relied on a Second Circuit decision it described as "address[ing] the question of a magistrate judge's authority to accept a guilty plea." *Id.*, citing *United States v Williams*, 23 F3d 629, 632-35 (2d Cir 1994). However, as

The Eleventh Circuit reached the same conclusion in *United States v Woodard*<sup>155</sup> after reviewing a similar procedural history, in which David Woodard explicitly consented to the role of the magistrate judge and did not seek to withdraw his plea until after sentencing.<sup>156</sup> The court held that conducting a plea colloquy and accepting a guilty plea “is ‘less complex’ than several of the duties the FMA expressly authorizes magistrate judges to perform” and thus that a magistrate judge is empowered to do so under the Additional Duties Clause.<sup>157</sup> In finding that “conducting a Rule 11 proceeding is comparable to the FMA’s enumerated duties,” the Eleventh Circuit specifically mentioned the power “to conduct entire civil and misdemeanor trials if the parties have consented[,] . . . to hear and determine pretrial matters, to conduct evidentiary hearings, and to submit to the district court proposed findings of fact and recommendations for disposition.”<sup>158</sup> The court seems not to have separately considered the plea colloquy and plea acceptance in deciding *Woodard*, as it claimed to be “join[ing] every circuit to have examined th[is] issue[ ],” despite the fact that many of the cited circuits considered only plea colloquy, not plea acceptance.<sup>159</sup> The language the court used in deciding the case also suggests no analytical differentiation between plea colloquy and plea acceptance, as the court noted that the defendant challenged the magistrate judge’s authority “to accept his guilty plea *and adjudicate him guilty of a felony*” but held only that “the FMA authorizes a magistrate judge . . . to conduct Rule 11 proceedings.”<sup>160</sup>

The final circuit to approve a magistrate judge’s felony plea acceptance is the Fourth Circuit in *United States v Benton*.<sup>161</sup> Like the defendants in *Woodard* and *Ciapponi*, Cedric Benton explicitly consented to pleading before a magistrate judge.<sup>162</sup> Prior to sentencing, however, Benton moved to withdraw his plea.<sup>163</sup> The district court found no “fair and just reason” for the withdrawal

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discussed below, the Second Circuit case relied on actually dealt only with a plea colloquy, not plea acceptance. See notes 186–94 and accompanying text.

<sup>155</sup> 387 F3d 1329 (11th Cir 2004) (per curiam).

<sup>156</sup> *Id* at 1330–31.

<sup>157</sup> *Id* at 1332–33.

<sup>158</sup> *Id*.

<sup>159</sup> *Woodard*, 387 F3d at 1331.

<sup>160</sup> *Id* (emphasis added).

<sup>161</sup> 523 F3d 424, 426 (4th Cir 2008).

<sup>162</sup> *Id*.

<sup>163</sup> *Id* at 427. The motion to withdraw his plea followed a change in counsel and was filed before Benton appeared at the sentencing hearing. *Id*.

and therefore denied the motion.<sup>164</sup> Benton argued on appeal that he should have been permitted to withdraw his plea for any reason, because the magistrate judge was not authorized to accept a felony guilty plea.<sup>165</sup> The appeals court, however, determined that it was not error for the magistrate judge to accept the guilty plea, arguing that "plea acceptance involves none of the complexity and requires far less discretion than that necessary to perform many tasks unquestionably within a magistrate judge's authority, such as conducting felony *voir dire* and presiding over entire civil and misdemeanor trials."<sup>166</sup>

Across these cases, the circuits relied on judgments regarding the relative importance and complexity of plea colloquy and acceptance as compared to other tasks that may permissibly be delegated to magistrate judges, ultimately finding that these tasks were comparable to the enumerated tasks.<sup>167</sup> In making this assessment, the Tenth and Eleventh Circuits repeatedly blurred the distinction between the plea colloquy and plea acceptance.<sup>168</sup> Both of these opinions routinely slip back and forth between these terms when discussing the issues, and both opinions regularly cite cases from other circuits that resolved only the plea colloquy question as supporting the position that magistrate judges may accept guilty pleas.<sup>169</sup> It is unclear, then, if either of these circuits considered the possibility that a magistrate judge might be empowered to conduct a plea colloquy but not to formally accept the guilty plea.

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<sup>164</sup> *Id.* Prior to finding that there was no fair and just reason for withdrawal, "[t]he district court reviewed the proceedings before the magistrate judge." *Id.* The standard applied at this stage was presumably *de novo* review, given that, as noted by the Fourth Circuit, "district judges retain the authority to review the magistrate judge's actions *de novo*." *Id.* at 429. Thus, the district court judge presumably found no reversible errors in the plea proceeding. However, as noted above, had the plea not yet been accepted when the motion to withdraw was filed, the defendant would have had an absolute right to withdraw the plea even in the absence of any error in the proceedings. See notes 145–47 and accompanying text.

<sup>165</sup> *Benton*, 523 F3d at 427–28.

<sup>166</sup> *Id.* at 432.

<sup>167</sup> See *id.*; *Woodard*, 387 F3d at 1332–33; *Ciapponi*, 77 F3d at 1250–51.

<sup>168</sup> See, for example, *Ciapponi*, 77 F3d at 1251 (stating the holding that "the broad residuary 'additional duties' clause of the Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding"); *Woodard*, 387 F3d at 1332 (referencing the fact that "a plea colloquy, while important, is 'less complex' than several of the duties the FMA expressly authorizes magistrate judges to perform").

<sup>169</sup> See, for example, *Ciapponi*, 77 F3d at 1251 (describing *Williams* as a case that "addressed the question of a magistrate judge's authority to accept a guilty plea," when *Williams* addressed only plea colloquies).

The Fourth Circuit in *Benton* did, however, separate plea colloquy from plea acceptance in its discussion.<sup>170</sup> The opinion described plea acceptance as “merely the natural culmination of a plea colloquy” and ultimately rejected the argument that “a magistrate’s acceptance of a plea should be considered different from his conducting a plea colloquy.”<sup>171</sup> In part, the desire to treat these two duties identically came from “the practical drawbacks of adopting” a rule that magistrate judges may perform plea proceedings but not accept guilty pleas, including that such a rule would “grant defendants a dry run or dress rehearsal.”<sup>172</sup> The court expressed concern that such a procedure “risks rendering plea proceedings before magistrate judges meaningless.”<sup>173</sup>

### C. The Seventh Circuit’s Position: Magistrate Judges Cannot Accept Guilty Pleas

The Seventh Circuit is the only circuit to determine that magistrate judges may not accept guilty pleas, as it instead treats plea colloquy and plea acceptance as distinct. In *United States v Harden*,<sup>174</sup> the Seventh Circuit broke from its sister circuits to hold that even with the consent of the parties, magistrate judges may not accept felony guilty pleas.<sup>175</sup>

As the appellants did in the cases described in Part II.B, Stacy Harden explicitly consented to the magistrate judge accepting the guilty plea.<sup>176</sup> On appeal, however, the Seventh Circuit ruled this consent insufficient.<sup>177</sup> The court concluded that accepting a felony guilty plea is “quite similar in importance to the conducting of a felony trial,” given that “[o]nce a defendant’s guilty plea is accepted, the prosecution is at the same stage as if a jury had just returned a verdict of guilty after a trial.”<sup>178</sup> Because there is broad agreement that magistrate judges may not conduct felony trials under the FMA, the court concluded that accepting felony guilty pleas is also beyond the powers of a magistrate judge.<sup>179</sup> The fact that “acceptance of a guilty plea is dispositive” and that

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<sup>170</sup> See *Benton*, 523 F3d at 431–33.

<sup>171</sup> *Id.* at 431.

<sup>172</sup> *Id.* at 432.

<sup>173</sup> *Id.*

<sup>174</sup> 758 F3d 886 (7th Cir 2014).

<sup>175</sup> *Id.* at 891.

<sup>176</sup> *Id.* at 887.

<sup>177</sup> *Id.* at 891.

<sup>178</sup> *Harden*, 758 F3d at 889.

<sup>179</sup> *Id.*

it "results in a final and consequential shift in the defendant's status" also made it clearly distinguishable from voir dire, according to the court.<sup>180</sup>

The court recognized that allowing magistrate judges to accept guilty pleas would promote efficiency.<sup>181</sup> However, this alone was insufficient to convince the court that such power should be granted. The court reasoned that Congress did not intend to choose efficiency of the judicial system over all other values.<sup>182</sup> The courts would at least need "explicit authorization from Congress" to delegate something as important as felony guilty plea acceptance, according to the Seventh Circuit.<sup>183</sup>

#### D. Circuits Addressing Plea Colloquies, but Not Plea Acceptance

Four circuits have addressed the power of magistrate judges to perform plea colloquies without considering whether magistrate judges may accept guilty pleas.<sup>184</sup> In all of these cases, the courts upheld the legitimacy of magistrate judges conducting plea colloquies.<sup>185</sup> However, the reasoning used to come to these decisions and the rhetoric surrounding both plea colloquies and plea acceptances illuminate the positions these courts would likely take were the question of plea acceptances to come before them.

The Second Circuit first considered the question of plea colloquies in *United States v Williams*.<sup>186</sup> Lloyd Williams consented to the referral of his guilty plea (for conspiracy to import heroin) "to a magistrate judge for the purposes of administering the allocution pursuant to [FRCrP] 11, making a finding as to whether the plea was knowingly and voluntarily entered, and recommending to the district court whether the plea should be accepted."<sup>187</sup> The magistrate judge "found a factual basis for the plea and recommended to the district court that it be accepted."<sup>188</sup> Upon learning that one of his contacts had been a government informant,

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 891.

<sup>182</sup> *Harden*, 758 F3d at 891.

<sup>183</sup> *Id.*

<sup>184</sup> The leading four cases are *Williams*; *United States v Dees*, 125 F3d 261 (5th Cir 1997); *United States v Torres*, 258 F3d 791 (8th Cir 2001); and *Reyna-Tapia*.

<sup>185</sup> See *Williams*, 23 F3d at 630; *Dees*, 125 F3d at 262-63; *Torres*, 258 F3d at 796; *Reyna-Tapia*, 328 F3d at 1116.

<sup>186</sup> 23 F3d 629 (2d Cir 1994).

<sup>187</sup> *Id.* at 631.

<sup>188</sup> *Id.*

Williams's counsel made an oral motion (apparently at the sentencing hearing) to withdraw his guilty plea and proceed to trial in order to allow him to pursue an entrapment defense.<sup>189</sup> The district judge concluded that there was "no basis for the application" and refused.<sup>190</sup> On appeal, the court relied on *Gomez* and *Peretz* to hold that a magistrate judge could conduct a plea colloquy with the defendant's consent.<sup>191</sup> Specifically, the court reasoned that the duties associated with "the conduct of civil and misdemeanor trials" are "comparable in responsibility and importance to administering a Rule 11 felony allocution."<sup>192</sup>

Throughout *Williams*, much as in *Ciapponi* and *Woodard*, the court regularly vacillated between referencing "plea allocution" (another term for plea colloquy) and referencing plea acceptance.<sup>193</sup> This case could be read to support later decisions that the two are inseparable and should not be considered differently. Indeed, the opinion does not even clearly articulate at what point Williams's plea was legally accepted or by whom. However, because the referral to the magistrate judge empowered her only to "recommend[ ] to the district court whether the plea should be accepted," it seems that the district court was responsible for actually accepting the plea.<sup>194</sup> Any statements in the case about plea acceptance by magistrate judges, then, are better understood as referring to the process of plea colloquy rather than to formal plea acceptance. Alternatively, these statements could simply be understood as dicta. Either way, the Second Circuit provides at best ambiguous support for the position that magistrate judges may formally accept felony guilty pleas.

The Fifth Circuit addressed plea colloquies in *United States v Dees*.<sup>195</sup> After Janet Dees consented to having a magistrate judge take her plea, the magistrate judge performed the colloquy and recommended that the district judge accept the plea.<sup>196</sup> The district court proceeded to accept the plea and sentence Dees.<sup>197</sup> Dees appealed on the basis that her sentence was miscalculated, and

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<sup>189</sup> See *id.*

<sup>190</sup> *Williams*, 23 F3d at 631.

<sup>191</sup> *Id.* at 632–34.

<sup>192</sup> *Id.* at 633.

<sup>193</sup> See, for example, *id.* at 630–31 (characterizing the defendant's "principal contention" as "that the magistrate judge lacked authority to accept his plea," although the magistrate judge in fact only recommended acceptance after performing the colloquy).

<sup>194</sup> *Williams*, 23 F3d at 631.

<sup>195</sup> 125 F3d 261, 263 (5th Cir 1997).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*



at no time raised any challenges to the magistrate judge's authority to conduct her plea allocution.<sup>198</sup> Nonetheless, the appeals court raised the issue sua sponte, as a potential jurisdictional challenge.<sup>199</sup> Ultimately, the court determined that "plea proceedings bear a close relationship" to other duties assignable to magistrate judges, such as pretrial evidentiary hearings assignable under § 636(b)(1).<sup>200</sup> Additionally, the court emphasized that "[b]ecause the district court retained full authority to review and reject the magistrate judge's recommendation, the delegation did not exceed the scope of magisterial authority contemplated by the Act."<sup>201</sup> The court observed that "[t]he taking of a plea by a magistrate judge does not bind the district court to accept the plea" and therefore found no threat to Article III's structural guarantees.<sup>202</sup> While the opinion does not extensively discuss plea acceptance, the reference to the nonbinding nature of the magistrate judge's activities suggests that the separation between plea colloquy and plea acceptance was relevant to the outcome of the case.

The Eighth Circuit heard a challenge to the magistrate judge's performance of a plea colloquy in *United States v Torres*.<sup>203</sup> Jaime Torres consented to the conduct of his plea colloquy by a magistrate judge, who then prepared a report and recommendation for the district judge, who accepted the guilty plea.<sup>204</sup> Torres did not attempt to withdraw his plea or challenge the jurisdiction of the magistrate judge prior to his appeal.<sup>205</sup> On appeal, the court held that it was permissible for a magistrate judge to conduct the plea colloquy with the consent of the defendant.<sup>206</sup> In reaching this conclusion, the court "agree[d] with the reasoning of the Second and Fifth Circuits" in *Williams* and *Dees*.<sup>207</sup> In the Eighth Circuit's discussion of these cases' precedential value, the two-step process of a magistrate judge submitting a report, followed by a district court's "*de novo* review of the magistrate judge's recommendation," appeared to influence the outcome, because it was "precisely

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<sup>198</sup> *Id.*

<sup>199</sup> *Dees*, 125 F3d at 263.

<sup>200</sup> *Id.* at 265.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 268.

<sup>203</sup> 258 F3d 791, 793 (8th Cir 2001).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 794.

<sup>206</sup> *Id.* at 796.

<sup>207</sup> *Torres*, 258 F3d at 796.

the procedure authorized by *Williams* and *Dees*.”<sup>208</sup> When magistrate judges are given the power to accept guilty pleas, the second step of the process is eliminated, as the district court judge is no longer involved in the final plea acceptance. Thus, the importance of the two-step process in the *Torres* opinion suggests that the Eighth Circuit might not permit magistrate judges to formally accept guilty pleas.<sup>209</sup>

When the Ninth Circuit addressed a magistrate judge's performance of a plea colloquy in *United States v Reyna-Tapia*,<sup>210</sup> it was influenced by Ninth Circuit decisions on related issues. In *United States v Washman*<sup>211</sup> and *United States v Alvarez-Tautimez*,<sup>212</sup> the Ninth Circuit held that a magistrate judge's recommendation to a district court judge that a guilty plea be accepted was not a legally effective acceptance of a guilty plea.<sup>213</sup> Therefore, between the plea colloquy in front of a magistrate judge and the acceptance of the plea by a district judge, the defendants in these cases maintained an “absolute right to withdraw” their pleas, for any or no reason.<sup>214</sup>

In *Reyna-Tapia*, the defendant consented to his plea being taken by a magistrate judge, and a magistrate judge conducted the plea colloquy and recommended that the guilty plea be accepted.<sup>215</sup> “After the expiration of the time to file objections” to this recommendation, and with no objections having been filed, the district judge issued an order accepting the plea.<sup>216</sup> After this order was issued, but prior to sentencing, Jose Reyna-Tapia moved to withdraw his plea.<sup>217</sup> However, finding no fair and just reason for the withdrawal, the district judge denied the motion and proceeded to sentencing.<sup>218</sup> On appeal, the court held that district court judges may accept the findings and recommendations of magistrate judges without conducting de novo review when no objections have been filed.<sup>219</sup> In reaching this conclusion, the court

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<sup>208</sup> *Id.*

<sup>209</sup> For more on the practical importance of this distinction, see Part III.C.

<sup>210</sup> 328 F3d 1114 (9th Cir 2003) (en banc).

<sup>211</sup> 66 F3d 210 (9th Cir 1995).

<sup>212</sup> 160 F3d 573 (9th Cir 1998).

<sup>213</sup> See *Washman*, 66 F3d at 212; *Alvarez-Tautimez*, 160 F3d at 575–76.

<sup>214</sup> *Alvarez-Tautimez*, 160 F3d at 576. See also *Washman*, 66 F3d at 213.

<sup>215</sup> *Reyna-Tapia*, 328 F3d at 1116.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1117.

<sup>218</sup> See *id.*

<sup>219</sup> *Reyna-Tapia*, 328 F3d at 1121–22.

first noted that plea colloquies bore relevant similarities to proceedings magistrate judges are specifically authorized to preside over by the FMA, including evidentiary hearings on motions to suppress a defendant's out-of-court statement and preliminary hearings to determine probable cause.<sup>220</sup> The court emphasized that defendants are entitled to de novo review if they file any objections, and that furthermore "defendants have an absolute right to withdraw guilty pleas taken by magistrate judges at any time before they are accepted by the district court."<sup>221</sup> The Ninth Circuit, then, consistently separated plea colloquies from plea acceptance in its opinion.<sup>222</sup> Additionally, the court emphasized the role of that separation as a safeguard that supports the ability of magistrate judges to conduct plea colloquies in the first place.<sup>223</sup> This safeguarding role suggests that if the Ninth Circuit were to collapse plea colloquy and plea acceptance into one unit of analysis, as some circuits in the majority have, it would conclude that magistrate judges could not even perform plea colloquies. Thus, the Ninth Circuit's logic is directly contrary to the logic of the majority circuits.

Overall, the circuits that have not yet considered whether magistrate judges may accept guilty pleas generally provide support to the Seventh Circuit's position that magistrate judges may perform plea colloquies without also accepting guilty pleas. The Fifth and Ninth Circuits both relied on the perceived procedural protection provided by district judge review prior to plea acceptance in upholding magistrate judges' performance of plea colloquies.<sup>224</sup> While the Eighth Circuit did not rely as explicitly on the two-step process in reaching its conclusion, it nonetheless seemed to be influenced by the nonbinding nature of the magistrate judge's recommendation.<sup>225</sup> Thus, among these circuits, only the Second Circuit's opinion in *Williams* supports the proposition

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<sup>220</sup> *Id.* at 1120–21.

<sup>221</sup> *Id.* at 1121.

<sup>222</sup> See, for example, *id.*

<sup>223</sup> See *Reyna-Tapia*, 328 F3d at 1121 ("Our conclusion is further supported by [the] procedural safeguards inhering within existing practice [of permitting magistrates to conduct plea colloquies but not to accept guilty pleas].").

<sup>224</sup> See *Dees*, 125 F3d at 268 (emphasizing that the recommendation of a magistrate judge "does not bind the district court to accept that plea"); *Reyna-Tapia*, 328 F3d at 1121.

<sup>225</sup> See *Torres*, 258 F3d at 796.

that magistrate judges may accept guilty pleas in addition to performing plea colloquies.<sup>226</sup> And as noted above, the *Williams* opinion provides only ambiguous support for this proposition.

### III. THE ROLE OF MAGISTRATE JUDGES IN GUILTY PLEAS

Delegations to magistrate judges through the Additional Duties Clause can be challenged on constitutional or statutory grounds. However, given the Supreme Court's statements regarding previous delegations that occurred with the parties' consent,<sup>227</sup> the constitutional grounds are unlikely to present a clear solution, as further explained in Section A. This Comment, then, focuses on statutory interpretation, such that the question reduces to the relative importance of criminal procedures, a question addressed by Section B. This Section argues that courts should try to ascertain congressional views of the relative importance of duties potentially delegable to magistrate judges when analyzing the proper scope of the Additional Duties Clause, and that the FRCrP provide valuable guidance on these congressional views. Finally, it concludes that an analysis of the FRCrP as applied to felony guilty plea acceptance reveals that Congress considers this duty significantly more important than any of the enumerated duties in 28 USC § 636. Therefore, this duty is not delegable under the Additional Duties Clause, even with defendant consent. This approach proves particularly useful because it allows objective analysis of the proper scope of the Additional Duties Clause.

#### A. Constitutional Arguments Are Unlikely to Resolve the Issue

Any constitutional challenge to a magistrate judge's power to accept guilty pleas would rest on the inability of consent to cure all constitutional issues.<sup>228</sup> Defendants may waive their "personal" protections, even of fundamental constitutional rights such as the right to trial, right to a jury, and right to be free of unreasonable searches.<sup>229</sup> However, individuals may not waive structural protections, as those are intended to protect society as a

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<sup>226</sup> See *Williams*, 23 F3d at 630.

<sup>227</sup> See, for example, *Peretz*, 501 US at 937 (stating that the Court was "convinced that no [ ] structural protections are implicated by the procedure followed" in allowing a magistrate judge to conduct jury selection in a felony trial with the parties' consent).

<sup>228</sup> See *Commodity Futures Trading Commission v Schor*, 478 US 833, 850–51 (1986) ("To the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty.").

<sup>229</sup> *Peretz*, 501 US at 936–37.

whole.<sup>230</sup> Individual litigants are unlikely to sufficiently weigh the long-term implications of altering the balance of power between branches, and thus are not permitted to effect such changes through their consent.<sup>231</sup>

The Supreme Court appears unsympathetic to arguments based on structural concerns related to the FMA.<sup>232</sup> The Court has acknowledged that magistrate judges are not Article III judges but has highlighted that magistrate judges are supervised by Article III judges, lessening structural concerns.<sup>233</sup> Additionally, plea acceptance is not referred to magistrate judges without the consent of district judges, and district judges retain the right to review all magistrate judge decisions *de novo*.<sup>234</sup> These limits caused the Court to deny that the FMA creates structural problems, leading the parties' consent to be dispositive.<sup>235</sup>

Therefore, while there might be a delegation the Court would strike down on constitutional grounds, the existing jurisprudence makes it difficult to predict what such a delegation would entail. Additionally, the principle of constitutional avoidance ensures that if a delegation can be struck down on statutory grounds, the Court will rely on that logic rather than tackling the constitutional questions.<sup>236</sup> Future reliance on constitutional avoidance in interpreting the Additional Duties Clause is particularly likely given that the Court has previously justified its interpretations of the clause in this way.<sup>237</sup> Thus, the statutory issues are a more fruitful focus of analysis.<sup>238</sup>

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<sup>230</sup> *Schor*, 478 US at 851 ("When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations service institutional interests that the parties cannot be expected to protect.").

<sup>231</sup> See *id.* at 850–51.

<sup>232</sup> See, for example, *Peretz*, 501 US at 937 ("Because the entire process takes place under the district court's total control and jurisdiction, there is no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts.") (quotation marks, citation, and brackets omitted).

<sup>233</sup> See *id.*

<sup>234</sup> *Id.* Reviewing plea acceptance *de novo* is not the equivalent of simply denying to magistrates the power to accept guilty pleas. See text accompanying note 147.

<sup>235</sup> See *Peretz*, 501 US at 937.

<sup>236</sup> See *Gomez*, 490 US at 864 ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

<sup>237</sup> See text accompanying notes 118–19.

<sup>238</sup> Despite the apparent reluctance of the Supreme Court to review FMA issues as constitutional issues, at least two recent pieces of legal scholarship have approached the circuit split through a constitutional lens. See Anna Gotfryd, Note, *The Safeguards of the*

## B. Statutory Interpretation Suggests Magistrate Judges Cannot Accept Felony Guilty Pleas

In considering whether felony guilty plea acceptance is delegable to magistrate judges, the circuits have compared the importance of, complexity of, and discretion required for guilty plea acceptance to those of the duties enumerated in the FMA.<sup>239</sup> This approach is based on the Supreme Court's jurisprudence, which used a similar methodology in *Mathews*,<sup>240</sup> *Gomez*,<sup>241</sup> *Peretz*,<sup>242</sup> and *Gonzalez v United States*.<sup>243</sup>

In applying this test, the animating disagreements do not focus on either what a magistrate judge must determine before accepting a guilty plea or the legal effect that acceptance has on the defendant. Indeed, such disagreement is unlikely because these legal standards are established by FRCrP 11.<sup>244</sup> Instead, the cases rely on subjective assessments of the importance of plea acceptance.<sup>245</sup> The apparent source of these judgments has been

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*Constitution: Fundamental Rights Not Disposable Gifts*, 2016 U Ill L Rev 627, 667–71 (arguing that, in addition to being generally too important to fall within the Additional Duties Clause, plea acceptance is reserved for Article III judges as a structural protection in the Constitution, rather than a personal right); Andrew Chesley, Note, *The Scope of United States Magistrate Judge Authority after Stern v. Marshall*, 116 Colum L Rev 757, 758–59 (2016) (describing “the primary legal challenge to the exercise of particular additional duties” such as accepting guilty pleas as “most often [being] that the duty the magistrate judge is attempting to execute is one that is reserved for Article III judges,” and ultimately concluding that magistrate judge authority is “less troubling under Article III” than bankruptcy judge authority and thus is likely constitutional). While the authors make compelling arguments, the Supreme Court is unlikely to seriously engage with any of them without a drastic change in membership, given that, among the sitting justices, only Justice Clarence Thomas has appeared sympathetic to constitutional arguments on this issue. See *Gonzalez v United States*, 553 US 242, 265–69 (2008) (Thomas dissenting) (addressing the “serious constitutional questions” presented by the Court’s interpretation of the FMA and criticizing the majority for giving the constitutional questions “short shrift”):

<sup>239</sup> See Parts II.B–D.

<sup>240</sup> *Mathews*, 423 US at 270–71.

<sup>241</sup> *Gomez*, 490 US at 865–71.

<sup>242</sup> *Peretz*, 501 US at 927–32.

<sup>243</sup> 553 US 242, 252 (2008).

<sup>244</sup> One could also imagine factual disputes regarding the practical effect of allowing magistrate judges to accept guilty pleas, and these factual questions are addressed in depth in Part III.C. For present purposes, however, it is sufficient to note that these practical questions do not seem to underlie the opinions.

<sup>245</sup> Compare *Benton*, 523 F3d at 433 (“[A]cceptance of a plea is a duty that does not exceed the responsibility and importance of the more complex tasks a magistrate is explicitly authorized to perform.”), with *Harden*, 758 F3d at 888 (“The task of accepting a guilty plea is a task too important to be considered a mere ‘additional duty’ permitted under § 636(b)(3): it is more important than the supervision of a civil or misdemeanor trial, or presiding over *voir dire*.”).

each judge's individual subjective assessment, as none of the opinions indicated that the decisions were based on the importance assigned to this function by any other body.

In light of related Supreme Court jurisprudence, this approach is incomplete, as statutory interpretation should consider congressional intent. For the Additional Duties Clause, the relevant consideration is the congressional perspective on the importance of various duties. While the FMA itself provides limited insight into this question,<sup>246</sup> FRCrP 11 suggests that Congress views accepting felony guilty pleas as a distinctively important duty, such that it is not delegable to magistrate judges under the Additional Duties Clause. Following this approach has the additional advantage of producing more valuable guidance for district courts regarding the scope of assignable duties moving forward, as the objective inquiry into congressional intent allows more predictable outcomes.

1. The FRCrP provide information about congressional views of the relative importance of criminal procedures.

When the text of a statute is ambiguous, one goal of statutory interpretation is to give effect to congressional intent, and "other statutes on the same subject" may illuminate such intent.<sup>247</sup> In the context of the Additional Duties Clause, the Supreme Court affirmed this approach by repeatedly describing the key issue as whether Congress intended the duty at issue to be within the magistrate judges' power.<sup>248</sup> Importantly, discerning congressional intent about the assignability of particular duties requires more than understanding that Congress intends less important duties to be delegable and more important duties to be nondelegable. Instead, the second-order consideration of how much importance Congress attributes to the duties is dispositive. Therefore, courts should attempt to discern congressional intent, rather than making their own assessments of the importance of these duties. Notably, neither courts nor commentators have looked beyond the text of the FMA itself for congressional guidance on this

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<sup>246</sup> See Part I.B.

<sup>247</sup> *North Haven Board of Education v Bell*, 456 US 512, 555 (1982) (Powell dissenting).

<sup>248</sup> For a lengthy discussion of the legislative history and goals of the FMA, see *Mathews*, 423 US at 266–72. See also *Gomez*, 490 US at 875–76 (stating in the decisive resolution of the issue that the Court was persuaded "that Congress did not intend the additional duties clause to embrace this function").

question.<sup>249</sup> However, the FRCrP provide valuable information regarding congressional views of the importance of criminal procedures, which has thus far been ignored.

The FRCrP were originally enacted “in 1944 following the successful implementation of the Federal Rules of Civil Procedure” (FRCP).<sup>250</sup> The current iteration of the FRCrP is authorized by the 1988 Rules Enabling Act.<sup>251</sup> This act empowers the judiciary to propose procedural rules, but Congress retains ultimate responsibility for the content of the rules, as it is entitled to reject proposed FRCrP amendments or to enact its own amendments independent of the judiciary.<sup>252</sup> This oversight is enabled by 28 USC § 2074(a), requiring the Supreme Court to give Congress at least seven months’ notice before any proposed rule change is to take effect.<sup>253</sup>

Beyond formal oversight, Congress demonstrated that the FRCrP reflect its will by actively participating in the rulemaking process. While most judicial proposals are accepted without amendment, they have not been universally accepted. For example, in 1974, Congress delayed implementation of proposed amendments to the FRCrP to permit time for congressional review of the proposed changes.<sup>254</sup> Following this delay, Congress approved many of the changes, but it included several modifications to the Supreme Court’s proposals, including additional

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<sup>249</sup> For example, one piece of recent scholarship addressing this split advocated looking only to the text of the FMA to determine the scope of the Additional Duties Clause, abandoning even the consent analysis introduced in *Peretz*, 501 US at 927–32, at least in the context of felony guilty pleas. See generally Tomi Mendel, Note, *Efficiency Run Amok: Challenging the Authority of Magistrate Judges to Hear and Accept Felony Guilty Pleas*, 68 Vand L Rev 1795 (2015). Despite focusing exclusively on the text of the FMA, the note’s solution is also oddly atextual, as it suggests that any “additional duties” must “fit neatly into a category enumerated in the [FMA],” thus rendering the Additional Duties Clause a superfluity. *Id.* at 1830.

<sup>250</sup> Jordan Gross, *An Ounce of Pretrial Prevention Is Worth More Than a Pound of Post-conviction Cure: Untethering Federal Pretrial Criminal Procedure from Due Process Standards of Review*, 18 Berkeley J Crim L 317, 324 (2013). See also Act of June 29, 1940, 54 Stat 688 (providing the initial authorization for the FRCrP).

<sup>251</sup> Pub L No 100-702, 102 Stat 4648 (1988), codified as amended in various sections of Title 28.

<sup>252</sup> 28 USC §§ 2072–74. Congress could also repeal the Rules Enabling Act altogether, withdrawing the power of proposing rules from the judiciary, if it were sufficiently dissatisfied with the rules coming from the judicial branch.

<sup>253</sup> Under this section, proposed rule changes must be transmitted to Congress no later than May 1 of the year they are to take effect and may take effect no earlier than December 1 “unless otherwise provided by law.” 28 USC § 2074(a).

<sup>254</sup> See Act of July 30, 1974, Pub L No 93-361, 88 Stat 397.



amendments developed by Congress.<sup>255</sup> Similarly, in 1994 Congress approved “[t]he proposed amendments to the [FRCrP] which are embraced by an order entered by the Supreme Court . . . but with” significant “amendments” to Rule 32.<sup>256</sup> More recently, Congress modified the amendments to Rule 16 proposed by the Supreme Court in 2002,<sup>257</sup> modified Rule 7 on its own initiative in 2003,<sup>258</sup> and modified Rule 6 on its own initiative in 2004.<sup>259</sup>

With regard to guilty pleas, Congress modified the Supreme Court’s proposed amendments to Rule 11 in 1975.<sup>260</sup> Congress also delayed implementation of the Supreme Court’s proposed amendments to Rule 11 in 1979 to enable more extensive review.<sup>261</sup> Of note, the 1975 and 1979 amendments represented major steps in the formalization of the plea colloquy and were nearly contemporaneous with major changes to the FMA in 1976 and 1979. Congress also made a minor technical modification to Rule 11 in 1989 without a formal proposal of amendment from the Supreme Court.<sup>262</sup> Congress’s history of direct involvement with Rule 11, of delaying the implementation of amendments to other sections in order to permit more extensive review, and of modifying proposals made by the Supreme Court to amend other rules, strengthens the presumption that the FRCrP accurately reflect congressional will. Therefore, despite being largely drafted by the judiciary,

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<sup>255</sup> See Federal Rules of Criminal Procedure Amendments Act of 1975, Pub L No 94-64, 89 Stat 370. As noted in the House report on the bill that eventually implemented the amendments, the amendments proposed by the judiciary “were [ ] numerous, diverse and controversial.” *Federal Rules of Criminal Procedure Amendments Act*, HR Rep No 94-247, 94th Cong, 1st Sess 2 (1975). The House Committee on the Judiciary’s Subcommittee on Criminal Justice held five days of hearings and “received comments about the proposed amendments from all segments of the legal profession.” *Id.* at 3.

<sup>256</sup> Violent Crime Control and Law Enforcement Act of 1994 § 230101, Pub L No 103-322, 108 Stat 1796, 2077–78 (amending sentencing procedures to require judges to determine whether the victim of “a crime of violence or sexual abuse . . . wishes to make a statement or present any information in relation to the sentence,” among other amendments).

<sup>257</sup> 21st Century Department of Justice Appropriations Authorization Act § 11019, Pub L No 107-273, 116 Stat 1758, 1825–26 (2002) (amending the rules regarding pretrial disclosure of expert testimony).

<sup>258</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 § 610(b), Pub L No 108-21, 117 Stat 650, 692 (creating a procedure to allow indictment of “an individual whose name is unknown, but who has a particular DNA profile”).

<sup>259</sup> Intelligence Reform and Terrorism Prevention Act of 2004 § 6501, Pub L No 108-458, 118 Stat 3638, 3760 (allowing government attorneys to disclose certain grand jury matters involving national security threats).

<sup>260</sup> Federal Rules of Criminal Procedure Amendments Act § 3, 89 Stat at 371–72.

<sup>261</sup> Act of July 31, 1979, Pub L No 96-42, 93 Stat 326.

<sup>262</sup> Minor and Technical Criminal Law Amendments Act of 1988 § 7076, Pub L No 100-690, 102 Stat 4395, 4406.

these rules provide a valuable source of insight into congressional understanding of the importance of criminal procedures.

This presumption is further supported by courts' discussions of congressional intent when interpreting other federal rules.<sup>263</sup> For example, congressional intent is frequently invoked to interpret the Federal Rules of Evidence,<sup>264</sup> with Congress even developing "Statement[s] of Congressional Intent" regarding some rules.<sup>265</sup> Further, while "Congress has full power to statutorily supersede any or all of the Rules," courts construe new statutes "to harmonize with" the federal rules "unless the congressional intent to [supersede the rule] clearly appears,"<sup>266</sup> an interpretive rule consistent with a presumption that the rules reflect congressional intent. That courts treat the federal rules like statutes for this purpose<sup>267</sup> supports the idea that the FRCrP can be used as a guide to congressional understanding of the relative importance of various aspects of criminal procedure.

Using the FRCrP as a guide to the importance of various aspects of criminal procedure when analyzing the scope of the FMA has the benefit of allowing the judiciary to directly present proposed amendments for congressional consideration. If the FRCrP

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<sup>263</sup> The various sets of federal rules (including, but not limited to, the FRCP, FRCrP, and Federal Rules of Evidence) all have their authorizations in the current Rules Enabling Act, although there are differences in their precise histories. Each set of rules was initially developed by the courts, with varying degrees of intervention by Congress over the years. For a detailed description of the rulemaking process, see generally Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am U L Rev 1655 (1995). Thus, interpretive rules governing one set of federal rules should generally be applicable to all of them.

<sup>264</sup> See, for example, *United States v Toney*, 615 F2d 277, 279–80 (5th Cir 1980) (holding that "Congress meant what it said in [Federal Rule of Evidence] 609(a)(2)"); *Complaint of American Export Lines, Inc.*, 73 FRD 454, 457 (SDNY 1977) (reviewing the "historical background" of Federal Rule of Evidence 803 to determine congressional intent).

<sup>265</sup> See, for example, Addressing Waiver of Attorney-Client Privilege, S 2405, 110th Cong, 2d Sess, in 154 Cong Rec 18015, 18016 (Sept 8, 2008) (statement of Rep Jackson-Lee) (inserting a "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence" into the Congressional Record).

<sup>266</sup> *Marx v General Revenue Corp.*, 668 F3d 1174, 1179 (10th Cir 2011), quoting *United States v Gustin-Bacon Division, Certainfeed Products Corp.*, 426 F2d 539, 542 (10th Cir 1970). See also, for example, *In re General Motors Corp Engine Interchange Litigation*, 594 F2d 1106, 1134 n 50 (7th Cir 1979) ("[W]e think that the proper rule of construction is that the Congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal."); *Grossman v Johnson*, 674 F2d 115, 122–23 & n 14 (1st Cir 1982) (noting the similarity of this interpretive principle and "the canon against implied repeals of statutes in the absence of clear intention to do so or repugnancy of the later to the earlier legislation"); *In re Beef Industry Antitrust Litigation*, 589 F2d 786, 787 (5th Cir 1979) ("There can be no doubt that the privilege of confidentiality, now embodied in Rule 26(c), . . . is a creation of Congress, just as are the [other FRCP].").

<sup>267</sup> See *Grossman*, 674 F2d at 123 n 14.

do not reflect the judiciary's views of the relative importance of procedures, such that relying on the FRCrP to infer the scope of the Additional Duties Clause restricts district judges' ability to refer otherwise-appropriate matters to magistrate judges, the judiciary can suggest modifications to the FRCrP that would remedy these flaws. Congress would then have the issue squarely presented to it, and it could accept or reject the proposed changes to clarify its position.

2. Congress has indicated the importance of guilty pleas by requiring personal interrogation of the defendant in FRCrP 11.

FRCrP 11 requires the court to "address the defendant personally in open court" to inform the defendant of his rights and the charges against him, as well as to establish that the plea is knowing, voluntary, and factually based.<sup>268</sup> This requirement of personal address is nearly unique within the FRCrP. Aside from when accepting guilty pleas, the court is required to "address the defendant personally" in only two other situations: first, "to permit the defendant to speak or present any information to mitigate the sentence" during sentencing,<sup>269</sup> and second, to "advise each defendant of the right to the effective assistance of counsel" when joint representation is proposed.<sup>270</sup> Although not explicit in the FRCrP, a defendant must also personally waive the right to counsel.<sup>271</sup> Notably, while the direct-address requirement applies, on its face, to both felonies and misdemeanors, FRCrP 43(b)(2) indicates that the defendant's presence is not required at "arraignment, plea, trial, [or] sentencing" in misdemeanor cases, so long as the defendant has provided written consent for the proceeding to occur in his absence.<sup>272</sup> The full force of FRCrP 11, then, is reserved for felony guilty pleas.

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<sup>268</sup> FRCrP 11(b).

<sup>269</sup> FRCrP 32(i)(4)(A)(ii).

<sup>270</sup> FRCrP 44(c)(2).

<sup>271</sup> See *New York v Hill*, 528 US 110, 114 (2000) (listing the "right to counsel" as an example of "certain fundamental rights" that can be waived only if "the defendant [ ] personally make[s] an informed waiver"). Because a defendant who is waiving the right to counsel is unrepresented, it is difficult to imagine how else the defendant could waive this right. See *Gonzalez*, 553 US at 255–56 (Scalia concurring in the judgment) (characterizing the requirement for defendants to personally waive the right to counsel as "essentially *sui generis*, since an unrepresented defendant cannot possibly waive his right to counsel except in person").

<sup>272</sup> FRCrP 43(b)(2).

The direct address of the defendant during a guilty plea suggests congressional concern with protecting the defendant during the plea process, even at the expense of efficiency. Personal address of defendants may require additional resources (such as translators) or time (spent explaining rights to defendants) relative to a colloquy with defendant's counsel, or a written and signed plea agreement alone. For some decisions, such as the decision to conduct voir dire before a magistrate judge, these efficiency concerns are sufficient to allow judges to address defendants' counsel rather than defendants.<sup>273</sup> These efficiency concerns also appear to animate the exception for misdemeanor pleas in FRCrP 43(b)(2). Yet personal address is always required for felony guilty pleas, indicating the heightened seriousness of this procedure. Indeed, the defendant's presence is not required at any point during misdemeanor trials,<sup>274</sup> but is required for felony pleas, highlighting the supreme importance of felony pleas. This level of importance in the FRCrP thus sets the duty of accepting felony guilty pleas apart from the enumerated duties assignable to magistrate judges under the FMA. Within the realm of criminal law, magistrate judges are permitted to conduct trials for misdemeanors and to enter sentences for misdemeanors with the parties' consent.<sup>275</sup> While these are often described by courts as complex and important duties,<sup>276</sup> the defendant's presence is not required for either proceeding under the FRCrP, in contrast to a felony plea proceeding. An evaluation of the procedural protections of the FRCrP, then, suggests that Congress considers felony guilty pleas to be more important than any misdemeanor proceedings.<sup>277</sup>

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<sup>273</sup> See *Gonzalez*, 553 US at 250 (concluding that because "requiring personal, on-the-record approval from the client . . . might distract from more pressing matters as the attorney seeks to prepare the best defense . . . consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial").

<sup>274</sup> See FRCrP 43(b)(2).

<sup>275</sup> 28 USC § 636(a)(3)–(5).

<sup>276</sup> See, for example, *Benton*, 523 F3d at 432 (highlighting the "complexity" of "presiding over entire . . . misdemeanor trials"); *Woodard*, 387 F3d at 1332–33 (same).

<sup>277</sup> The enhanced level of importance attached to felony pleas relative to misdemeanor trials is reasonable given that, by definition, felonies are more serious crimes that expose defendants to heightened penalties. See 18 USC § 3559(a). Differences in the collateral consequences of felonies and misdemeanors also reflect the difference in seriousness. For example, felons are barred from serving on juries or carrying firearms, see 28 USC § 1865(b)(5); 18 USC § 922(g)(1), while most convicted of misdemeanors are not subject to these penalties. Given these differences, it is reasonable for Congress to view a dispositive procedure in a felony case as more important than any procedure in a misdemeanor case.

Relatedly, a well-recognized limitation on magistrate judges' power is that they may not conduct felony trials.<sup>278</sup> FRCrP 43 contains identical requirements for the defendant's presence at the plea, sentencing, and "every trial stage."<sup>279</sup> Thus, despite clearly distinguishing the importance of misdemeanor proceedings from the importance of all felony proceedings through varied requirements for the defendant's presence, the FRCrP do not similarly suggest that felony trials are more important than felony guilty pleas. It is apparent from FRCrP 43 alone, then, that felony guilty pleas are more important than any misdemeanor proceedings.<sup>280</sup>

FRCrP 43 alone would be insufficient to distinguish felony guilty pleas from jury impanelment, which the Supreme Court held in *Peretz* and *Gonzalez* to be a duty assignable to magistrate judges,<sup>281</sup> as the presence of the defendant is required for both procedures. However, FRCrP 11 (governing guilty pleas) and FRCrP 24 (governing jury selection) reveal significant differences in the roles of defendants in these two procedures. FRCrP 24 states that only "the [c]ourt" or "attorneys for the parties," rather than the defendant, may "examine prospective jurors."<sup>282</sup> Similarly, while peremptory challenges are described as belonging to the "defendants" themselves, rather than their attorneys, there are no procedures requiring the defendants to directly exercise these challenges.<sup>283</sup> In contrast, FRCrP 11 requires direct address of the defendant, and only the defendant may officially enter a guilty plea.<sup>284</sup> While one might argue that this difference is based on the enhanced complexity of voir dire relative to pleading, this is not how the Supreme Court in *Gonzalez* framed the choice between requiring personal waiver and allowing waiver by counsel. Instead, in noting that "[w]hat suffices for waiver depends on the nature of the right at issue," the Court emphasized that "[f]or certain fundamental rights, the defendant must personally make an informed waiver."<sup>285</sup> Similarly, while "the lawyer has—and must

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<sup>278</sup> See notes 96–97 and accompanying text.

<sup>279</sup> FRCrP 43(a), (c). Again, while this requirement applies on its face to both felonies and misdemeanors, FRCrP 43(b)(2) allows a misdemeanor defendant to waive it, reserving FRCrP 43's force for felony trials alone.

<sup>280</sup> This result makes sense, given that a defendant is in the same position following the acceptance of a felony guilty plea as after a guilty verdict following trial. *Harden*, 758 F3d at 889.

<sup>281</sup> See notes 122–33 and accompanying text.

<sup>282</sup> FRCrP 24(a)(1).

<sup>283</sup> FRCrP 24(b).

<sup>284</sup> FRCrP 11(a)–(c).

<sup>285</sup> *Gonzalez*, 553 US at 248, quoting *Hill*, 528 US at 114.

have—full authority to manage the conduct of the trial” by making all needed “tactical decisions,” the attorney still cannot unilaterally waive certain “basic rights.”<sup>286</sup> This focus on the importance of the underlying right at stake, rather than the complexity of the decision, reflects an understanding of procedure as geared toward protecting important rights, rather than single-mindedly promoting efficiency.<sup>287</sup> Thus, the Supreme Court’s holdings in *Peretz* and *Gonzalez* can also be reconciled with an approach based on the FRCrP.

A potential objection to this analysis is that the direct-address requirement emphasizes the importance of plea colloquy—a duty universally recognized by courts as delegable—rather than plea acceptance. While this objection is well taken, it is ultimately incorrect. The plea colloquy itself is not inherently important; it is important only as a safeguard for the defendant against the consequences of the guilty plea. The plea colloquy is not undertaken for its own sake, but instead is merely a step that must be taken “[b]efore accepting a plea of guilty” and “[b]efore entering judgment on a guilty plea.”<sup>288</sup> When a plea colloquy is conducted but no plea is officially accepted, no change in the defendant’s legal rights or obligation has taken place. Until the plea is accepted, the defendant has been convicted of no crime. Thus, empowering magistrate judges to conduct plea colloquies does not enable them to enter a legally binding disposition in a felony case; it instead empowers them only to question the defendant and provide advice to the ultimate decision-maker. If magistrate judges are empowered to accept guilty pleas, however, their impressions will necessarily be legally binding.

As noted above, prior to plea acceptance, defendants may withdraw their pleas for any or no reason. After plea acceptance, a defendant must show a fair and just reason for withdrawal of the plea. This change in the substantive rule of decision means that de novo review of the proceedings by the district judge is unable to effectively undo the legal effect of a magistrate judge’s acceptance of a guilty plea.<sup>289</sup> Even under de novo review, the defendant will

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<sup>286</sup> *Gonzalez*, 553 US at 248–50, quoting *Hill*, 528 US at 114–15.

<sup>287</sup> It is true that the Court later discussed complexity in justifying why “tactical decisions” can be made by lawyers alone. *Gonzalez*, 553 US at 247–51. However, the Court reached this justification only after analyzing whether the right at issue is simply too important to be subject to attorney decision-making. See *id.*

<sup>288</sup> FRCrP 11(b)(2)–(3).

<sup>289</sup> Prior to formal acceptance, the defendant remains free to withdraw his plea for any or no reason. After the court has accepted the plea, the defendant loses this right, and

still be required to show a reason why the plea should be withdrawn. Instead, requiring the district judge's affirmative acceptance as a second step before the plea becomes legally binding better reflects the heightened level of importance of felony guilty pleas indicated in the FRCrP.

### C. Practical Implications of Denying Magistrate Judges the Power to Accept Felony Guilty Pleas

While Sections A and B considered the formal basis for denying magistrate judges the power to accept felony guilty pleas, it is worth also considering the practical implications of this argument, including both systemic efficiency losses and enhanced protection of individual rights. This Section argues first that the efficiency losses predicted in several courts' opinions are overstated. Second, this Section argues that the potential enhancements of individual rights have been underappreciated in discussions of this issue.

1. Fears of severe efficiency losses from denying magistrate judges the power to accept felony guilty pleas are likely exaggerated.

A significant motivation for the enactment of the FMA, and of the Additional Duties Clause, was to promote the efficient functioning of the court system.<sup>290</sup> Fears of efficiency losses seemingly motivated decisions that permit magistrate judges to accept guilty pleas. These concerns were most directly addressed in *Benton*, the only case to explicitly address the difference between plea colloquies and plea acceptances and hold that magistrate judges may perform both.<sup>291</sup> The court argued that allowing magistrate judges to perform plea colloquies but not plea acceptances would lead to tremendous inefficiencies, including in many cases "a complete waste of judicial resources."<sup>292</sup> This argument was founded on the suggestion that defendants might use their plea colloquies as practice to determine how they feel after entering their guilty pleas, later withdrawing their pleas before district judges could accept them.<sup>293</sup>

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may withdraw his plea only for a "fair and just reason," or if the court rejects his plea deal. FRCrP 11(d).

<sup>290</sup> *Mathews*, 423 US at 267.

<sup>291</sup> *Benton*, 523 F3d at 432-34.

<sup>292</sup> *Id* at 432.

<sup>293</sup> *Id* at 433. This specific argument is addressed in more depth in Part II.B.

Dire predictions seem unjustified, however, given the experience of circuits that separate the roles of plea colloquy and plea acceptance. Fifth Circuit magistrate judges perform more guilty plea proceedings than those in any other circuit (8,485 in the year ending in September 2014),<sup>294</sup> even though the Fifth Circuit has not granted magistrate judges the authority to legally accept guilty pleas, but instead has granted only the authority to perform plea colloquies.<sup>295</sup> The next-highest circuit in volume of plea proceedings conducted by magistrate judges, with 8,456,<sup>296</sup> is the Ninth, which has repeatedly held that magistrate judges' recommendations following plea colloquies are not legally binding.<sup>297</sup> That these circuits refer guilty plea proceedings to magistrate judges in large numbers, while distinguishing between plea colloquy and plea acceptance, suggests that these circuits have not experienced such a separation as a waste of judicial resources.

The relative performance of districts within each circuit in terms of time from filing to disposition provides an additional point of reference in analyzing efficiency concerns.<sup>298</sup> In the year ending June 30, 2015, 70,001 felony cases were filed in US district courts.<sup>299</sup> Nationwide, the median time from filing to disposition of felonies was approximately 7.5 months.<sup>300</sup> While the caseload statistics compiled by the Administrative Office of the US Courts provide only median time from disposition to filing in each district, making aggregate statistical analysis across circuits challenging, some suggestive comparisons are still possible. Specifically, ranking each district by time to disposition of felonies, and comparing the mean rankings across circuits, provides a rough sense of the relative performance across circuits. Notably, the three circuits that permit magistrate judges to accept guilty pleas are also the circuits that perform best in this analysis. Indeed, six of the top

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<sup>294</sup> Table M-4: U.S. District Courts—Criminal Pretrial Matters Handled by U.S. Magistrate Judges under 28 U.S.C. 636(b) during the 12-Month Period Ending September 30, 2014 \*2, archived at <http://perma.cc/87SR-SDYA>.

<sup>295</sup> See Part II.D.

<sup>296</sup> Table M-4: U.S. District Courts—Criminal Pretrial Matters Handled by U.S. Magistrate Judges at \*3 (cited in note 294).

<sup>297</sup> See Part II.D.

<sup>298</sup> While these data are not available in this form, for each district, the median time from filing to disposition by type of case is available. See generally *United States District Courts—National Judicial Caseload Profile*, archived at <http://perma.cc/8E87-E65T>. From that information, the districts can be ranked, and an average rank for each circuit can be calculated.

<sup>299</sup> Id at \*1.

<sup>300</sup> Id.



ten districts with the shortest median times are within these three circuits, as are fourteen of the top twenty districts. This is disproportionate representation from these circuits, given that only approximately 28 percent of the nation's districts are within these three circuits.<sup>301</sup> This suggests that allowing magistrate judges to accept felony guilty pleas may promote expeditious disposition of felony cases.

However, the limitations of this methodology, especially in light of important possible confounding factors, such as the total caseload per judge and the ratio of types of cases, suggest it is not possible to draw a strong inference of causation from these data.<sup>302</sup> For example, districts with an unusually high proportion of immigration cases also have unusually short median times from filing to disposition in felony cases,<sup>303</sup> reflecting the possibility that differences across circuits could be driven largely by factors other than the ability of magistrate judges to accept guilty pleas. Additionally, it is noteworthy that the circuits permitting magistrate judges to accept felony guilty pleas do not perform as well when the same methodology is used to evaluate performance on civil matter duration. While fully analyzing the reasons for this difference in performance between criminal and civil cases is beyond the scope of this Comment, it seems at least plausible that there is a trade-off between speedy disposition of criminal matters and speedy disposition of civil matters. Thus, inefficiencies introduced on the criminal side might nudge courts toward greater efficiency on the civil side. For example, if courts find it inefficient to permit magistrate judges to perform felony plea colloquies absent the power to accept the pleas, perhaps courts will fill magistrate judges' dockets with more civil matters that are clearly assignable under the FMA. While the possibility of such an outcome is speculative, there is some evidence that procedural efficiency on one

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<sup>301</sup> The Fourth Circuit has nine districts, the Tenth Circuit has eight districts, and the Eleventh Circuit has nine districts, for a total of twenty-six districts. The nation as a whole has ninety-four. See generally *id.*

<sup>302</sup> Indeed, no formal tests for statistical significance were performed, as the limitations of this analysis are likely too great to render such tests meaningful.

<sup>303</sup> The District of New Mexico, for example, had approximately 4,450 criminal felony cases in 2015 (including criminal transfers), of which more than 3,450 (or over 75 percent) were immigration cases, the highest proportion in the country. *United States District Courts—National Judicial Caseload Profile* at \*81 (cited in note 298). This district also had the shortest median time from criminal felony filing to disposition, at one month. *Id.* The other districts with over 50 percent immigration cases are the District of Arizona (4.9 months), the Southern District of Texas (5.1 months), and the Western District of Texas (5.2 months). See *id.* at \*36–37, 65.

side of the civil-criminal divide can be influenced by docket pressures on the other side. For example, one account of the rise of plea bargaining suggests that judges' acceptance of plea bargaining procedures was largely motivated by the need to reduce docket pressure in the face of increasingly complex civil litigation.<sup>304</sup>

The overall impact on efficiency of denying magistrate judges the power to accept felony guilty pleas is thus uncertain, and may be minor. However, as is shown in the next Section, the potential benefits to individual defendants are significant.

2. Denying magistrate judges the authority to accept felony guilty pleas would enhance the protections afforded to defendants.

Ideally, plea bargains are understood to provide a "mutuality of advantage" to both the prosecution and the defense, enhancing the efficiency of the criminal justice system while limiting risk to the defendant.<sup>305</sup> Furthermore, plea bargains are often understood to be "inherent in the criminal law and its administration" given the existence of charging and sentencing discretion.<sup>306</sup> Indeed, without guilty pleas, the system would quickly malfunction, as it is unprepared to handle the volume of trials that would be required.<sup>307</sup>

Despite their importance and possible inevitability, plea bargains are frequently criticized as insufficiently protective of individual rights.<sup>308</sup> Some scholars have even suggested that the plea bargaining process is inherently unconstitutional.<sup>309</sup> With over 97 percent of convictions resulting from guilty pleas,<sup>310</sup> these criticisms have gained significant attention. In particular,

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<sup>304</sup> See George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 116–24 (Stanford 2003).

<sup>305</sup> *Brady v United States*, 397 US 742, 752 (1970).

<sup>306</sup> *Id.* at 751–52.

<sup>307</sup> See Lindsey Devers, *Plea and Change Bargaining: Research Summary* \*1 (Department of Justice, Bureau of Justice Assistance, Jan 24, 2011), archived at <http://perma.cc/Z6L3-XFSJ> (concluding that 95 percent of cases disposed of in federal district court ended in guilty pleas). See also *Santobello v New York*, 404 US 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

<sup>308</sup> See generally, for example, Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 BC L Rev 871 (2010).

<sup>309</sup> See generally, for example, Note, *The Unconstitutionality of Plea Bargaining*, 83 Harv L Rev 1387 (1970).

<sup>310</sup> See Mark Motivans, *Federal Justice Statistics, 2011-Statistical Tables* \*17 (Department of Justice, Bureau of Justice Statistics, Jan 2015), archived at <http://perma.cc/LK2U-8LLR>.

plea colloquies are often characterized by leading, compound questions, which are prohibited during direct examination at trial due to concerns about their evidentiary value.<sup>311</sup> The process has also been criticized based on the flawed incentives provided to defense attorneys<sup>312</sup> and the limited degree to which plea bargains replicate likely trial outcomes.<sup>313</sup> The rules governing plea withdrawal have also been criticized as “having an extensive, unjust, and deleterious impact” on defendants.<sup>314</sup> Time pressure in pleading is also commonly criticized, as individuals under time pressure are “less likely to engage in systematic information processing.”<sup>315</sup> On a more basic level, a large number of “psychological pitfalls” have been identified in the plea process.<sup>316</sup> Even under the best of circumstances, then, individual rights may be significantly sacrificed during pleading.

Weaknesses in rights protection during the process are especially troubling for defendants who waive their right to perform a plea colloquy before an Article III judge. The importance of in-person cues for assessing the defendant’s responses renders de novo review of a plea colloquy difficult, much like the difficulty of

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<sup>311</sup> Julian A. Cook III, *Federal Guilty Pleas under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 Notre Dame L Rev 597, 615–28 (2002). See also, for example, *State v Raleigh*, 778 NW2d 90, 94 (Minn 2010) (establishing the defendant’s mens rea based on his affirmative response to the question: “And just so we’re clear here, [the beating] happened not only before you went out to look at the car, but that actually was what you had in mind when you came back from the car, to finish [Porter] off?”) (brackets in original).

<sup>312</sup> See, for example, Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 Iowa L Rev 119, 140–66 (2009) (describing how certain constitutional doctrines within the area of pleading, when combined with other factors, incentivize judges and lawyers to stay silent regarding the potential collateral consequences of a guilty plea, rather than saying something at the “risk of saying something wrong”).

<sup>313</sup> See generally, for example, Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv L Rev 2463 (2004) (arguing that the likely outcome of trial has a more minimal influence on plea bargains than is generally assumed, due to a combination of structural issues, including agency costs and cognitive biases on the part of the participants).

<sup>314</sup> Julian A. Cook III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U Colo L Rev 863, 864–65 (2004).

<sup>315</sup> Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 Marq L Rev 163, 176 (2007), quoting Gerben A. van Kleef, Carsten K.W. De Dreu, and Antony S.R. Manstead, *The Interpersonal Effects of Emotions in Negotiations: A Motivated Information Processing Approach*, 87 J Personality & Soc Psychology 510, 516 (2004).

<sup>316</sup> See Bibas, 117 Harv L Rev at 2496–2519 (cited in note 313) (noting that these psychological pitfalls include “self-serving biases and overconfident optimism,” “denial mechanisms and psychological blocks that may prevent the parties from seeing the weaknesses in their own cases,” “discounting of future costs,” “loss aversion and risk aversion,” susceptibility to “framing,” and “anchoring and adjustment”).

reviewing voir dire noted by the Supreme Court in *Gomez*.<sup>317</sup> Flaws in how voluntary or knowing the plea was may thus be difficult to identify after the plea has been accepted, such that even defendants with fair and just reasons for withdrawal may sometimes be denied the right to withdraw. Therefore, while de novo review of the colloquy remains a valuable safeguard against procedural errors, it may be insufficient to afford equivalent protection to defendants whose colloquies are conducted before magistrate judges and those whose colloquies are heard by Article III judges. If plea colloquies provide suboptimal rights protection even before Article III judges, as many fear, any diminution in that protection caused by delegation of the task to magistrate judges is particularly worrisome.

For defendants who perform their plea colloquies before magistrate judges, then, temporal separation before plea acceptance by a district judge would be a valuable additional safeguard. Such an additional safeguard may be necessary to ensure that defendants receive equivalent protection regardless of who conducts their plea colloquies. Contrary to the Fourth Circuit's assertions in *Benton*, the practice of allowing "defendants to use magistrate-led colloquies as go-throughs in order to gauge whether they may later experience 'buyer's remorse'" is not a waste of resources.<sup>318</sup> Significant postplea, presentencing regret may indicate flaws in how voluntary or knowing the plea was, supporting a defendant's right to trial. The additional time for reflection could also promote optimal information processing and help to counter the psychological pitfalls of the plea process.<sup>319</sup>

In most cases, allowing magistrate judges to conduct plea colloquies—but not to formally accept pleas—would produce identical

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<sup>317</sup> *Gomez*, 490 US at 874 (noting "serious doubts that a district judge could review [voir dire] meaningfully").

<sup>318</sup> *Benton*, 523 F3d at 432–33.

<sup>319</sup> Indeed, this argument could easily be extended to suggest that all defendants should get the benefit of temporal separation between the colloquy and plea acceptance. As a matter of policy, this may be correct, but it is certainly not required by current federal law. To the extent that defendants are then subject to somewhat different procedures depending on whether they proceed before a magistrate judge or an Article III judge, this type of "tactical decision" about whether to proceed before a magistrate judge or a district judge is already one that defendants and their lawyers must make in many cases. *Gonzalez*, 553 US at 249–51. Further, by making the delegation of duties to magistrate judges subject to the discretion of district court judges, Congress has ensured that there will be discrepancies in the treatment of different defendants, unless one considers magistrate judges to be strictly equivalent to Article III judges (which neither Congress nor the Supreme Court has suggested).

results as allowing magistrate judges to accept pleas. Defendants who truly meet the requirements for entering a plea<sup>320</sup> have little reason to seek to withdraw their plea before a district judge accepts it. While one could easily envision a defendant seeking to withdraw his plea after sentencing, particularly if the sentence is harsher than expected, the district judge must accept the plea before sentencing, eliminating this possibility. Thus, granting defendants additional postplea time to reflect on their decision is a relatively low-cost way to protect defendants' rights.

### CONCLUSION

Magistrate judges are integral to the modern judiciary, but their power to accept duties delegated by Article III judges is not unbounded. The precise boundaries of their power under the Additional Duties Clause of the FMA are unclear, though, given the broad wording of the Act. This ambiguity has led to a divide among the circuits, with three circuits permitting magistrate judges to accept guilty pleas and one circuit explicitly denying magistrate judges this power. For defendants who seek to withdraw their plea after the plea colloquy, but before sentencing, the circuit's rule on this issue makes the difference between proceeding to trial and proceeding to sentencing.

To date, courts that have considered this issue focused on the importance and complexity of plea acceptance in the abstract. This Comment proposes that, instead, courts should look to Congress for guidance on the importance of plea acceptance relative to other duties that may be delegated to magistrate judges. The FRCrP provide this guidance by highlighting the unique importance of felony guilty pleas through the procedural protections provided for such pleas. Permitting magistrate judges to perform plea colloquies, but not to accept guilty pleas, would have limited impact on systemic efficiency and would provide an important safeguard for defendants' rights.

Beyond addressing felony guilty pleas, this Comment provides the first objective framework for analyzing the scope of the Additional Duties Clause. Implementing this approach in decisions regarding the scope of the Additional Duties Clause will

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<sup>320</sup> Defendants should understand the charges against them and the consequences of their plea, enter the plea voluntarily, and make a plea with a factual basis. See FRCrP 11(b).

enable more consistency in future cases, potentially avoiding additional circuit splits and the need for ongoing Supreme Court oversight. As a further benefit, grounding the analysis in the FRCrP also promotes a straightforward path for dialogue between the courts and Congress on these issues.

